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THE
LAW AND PRACTICE
OF
BANKRUPTCY,
WITH
A COLLECTION OF FORMS AND PRECEDENTS,
AND
PRACTICAL NOTES.

BY EDWARD E. DEACON,
OF THE INNER TEMPLE, ESQ. BARRISTER-AT-LAW.

Second Edition,
REVISED AND CORRECTED BY THE AUTHOR;
WITH SOME ADDITIONAL REFERENCES AND NOTES

BY JOHN DE GEX,
OF LINCOLN'S INN, ESQ. BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. I.

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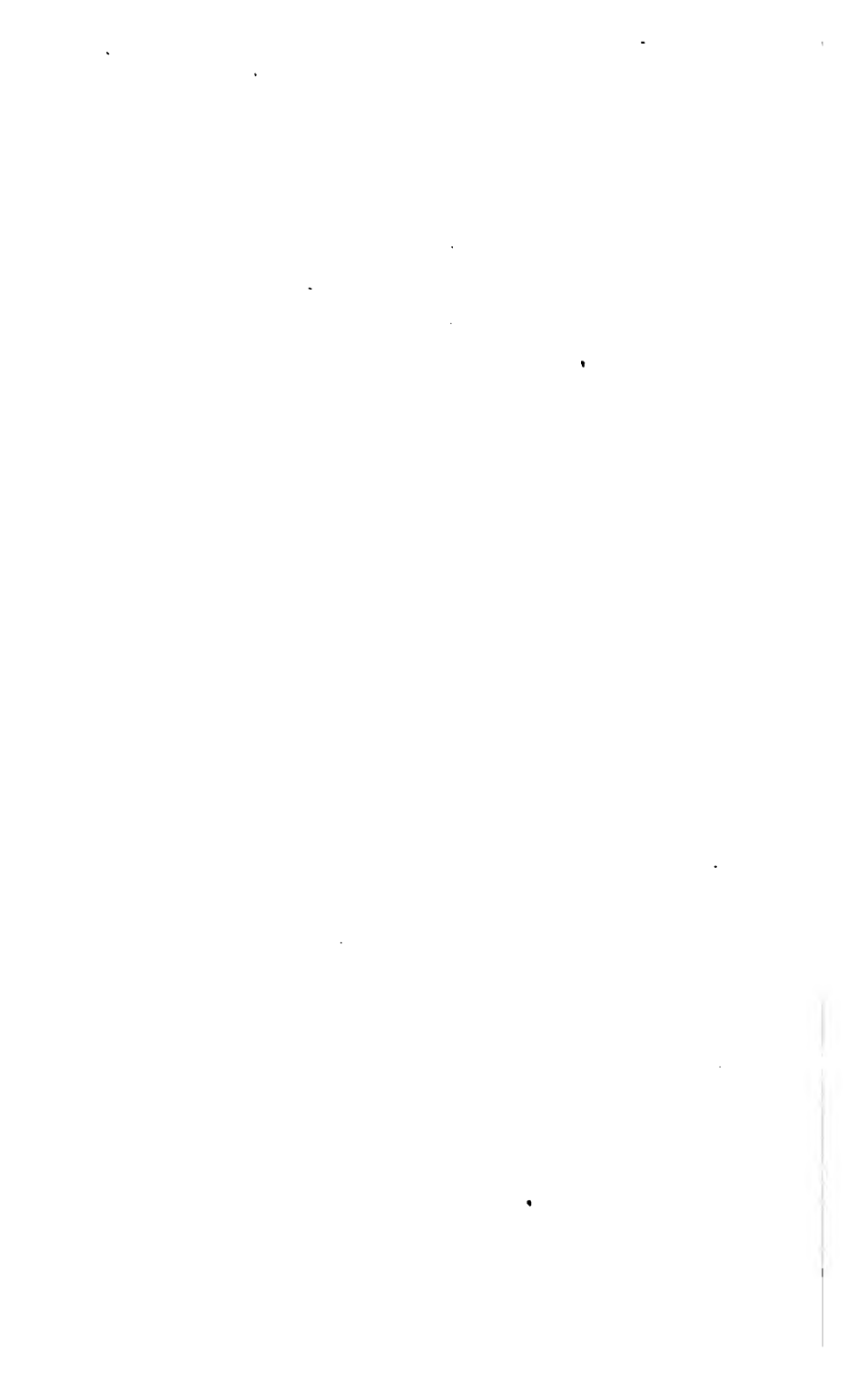
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ADDENDA ET CORRIGENDA

IN VOL. I.

The following Additions and Corrections will, it is believed, bring the Authorities down to the present time. They should be introduced at the places indicated, and this copy being printed on one side only, may be used for the purpose.

JURISDICTION OF LORD CHANCELLOR AND COURT OF REVIEW.

Page 7, note 1. Thus the Lord Chancellor sitting in bankruptcy may send a case for the opinion of a court of Law, *ex parte Clarke*, 1 De G. 153.

Page 7, note 3, and see *ex parte Van Sandau*, 1 De G. 303.

Page 7, note 5, The Court of Review is now abolished, and its jurisdiction transferred to one of the Vice-Chancellors. See 10 & 11 Vict. c. 102, *post*, vol. 2, p. 462. What follows in the course of this work with reference to the Court of Review must be read as applying to the Vice-Chancellor sitting in Bankruptcy. As to the jurisdiction of the Court of Review, and of a single judge of the court to commit for contempt, see *ex parte Turner*, 3 M. D. & D. 523, 1 De Gex, 30; *ex parte Van Sandau*, 1 De Gex, 55; *Van Sandau v. Turner*, 6 Q. B. 773; *Green v. Elgie*, 5 Q. B. 99; and as to the jurisdiction to grant an injunction, see *ex parte Van Sandau*, 1 De Gex, 55.

Page 7, note 7. But not necessarily of matters in insolvency which, before 10 & 11 Vict. c. 102, came before commissioners of bankruptcy under 7 & 8 Vict. c. 96, *ex parte Newlands*, 1 De Gex, 150.

Page 10, note 3. But see *Atkinson v. Raleigh*, 3 Q. B. 79. The form of an order of the Court of Review annulling a fiat was not absolute, but "if the lord chancellor shall think fit."

Page 14, note 3. As to the jurisdiction to grant injunction in cases of contempt, see *ex parte Van Sandau*, 1 De Gex, 55.

TRADING.

Page 31, note 8. See *ex parte Hammond*, 1 De Gex, 93, as to definition of market gardener.

Page 35, note 2, and see *Baillie v. Grant*, 9 Bingh. 123; but a man cannot make himself a bankrupt unless he is at the time a trader, or during his trading contracted a subsisting debt sufficient to support a creditor's fiat, *ex parte Mitchell*, 1 De G. 27.

ACT OF BANKRUPTCY.

Page 61, note 4. And a warrant of attorney given on the understanding that execution was not to be levied unless there were other writs in the sheriff's hands, is not within the section, *Gore v. Lloyd*, 12 M. & W. 463.



Addenda et Corrigenda.

Page 69, note 2. But the price must not be paid in promissory notes, *ex parte Zwischenbart*, 3 M. D. & D. 671, S. C. on appeal *Re Marshall*, 1 De G. 273.

Page 81, note 1. It has been doubted whether the provisions of this Act repeal 1 & 2 Vict. c. 110, s. 8; see *ex parte Cheese*, 3 M. D. & D. 79. The creditor may proceed by action and take the preliminary steps up to the issuing of the fiat under the Act at the same time, *Covington v. Hogarth*, 8 Scott, N. R. 725. As to what is a sufficient ground for affidavit of debt, see *Smith v. Temperley*, 16 Mees. & Wels. 273.

Page 81, note 2. As to proceeding on the bond under the provision of 1 & 2 Vict. c. 110, s. 8, see *Hinton v. Acraman*, 2 C. B. 367. The court cannot order the bond to be cancelled on a suggestion that the debtor had rendered, *Hayward v. Heffer*, 5 Q. B. 1011.

Page 82, note 3. Affidavit of debt taken off the file by consent, *Anon.* 1 De G. 334. It must agree altogether with the particulars of demand, *ex parte Greenstock*, 1 De G. 230.

Page 84, note 2. As to proceedings on the bond under the corresponding provision of 1 & 2 Vict. c. 110, s. 8, see *Hinton v. Acraman*, 2 C. B. 367. The court cannot order the bond to be cancelled on a suggestion that the debtor had rendered, *Hayward v. Heffer*, 5 Q. B. 1011.

Page 87. Add at the end of paragraph 18, "but query as to costs, where there is a reference to arbitration," *Higginson v. Broadhurst*, 1 D. & L. 490.

PETITIONING CREDITOR'S DEBT.

Page 91, note 6. Insert at the beginning, "and although such security is forged," *ex parte Hind*, 1 De G. 161; and at the end, "a debt of £150, of which a part is due to a partnership, is sufficient, *Doe v. Ingleby*, 14 Mees. & Wels. 91."

Page 98, note 6. The interest on the new debt need not have accrued due before the old debt, *Fletcher v. Manning*, 12 Mees. & Wels. 571. 1 Car. & Kir. 350.

Page 107, note 2. But proceeding under 5 & 6 Vict. c. 122, s. 13, is not an election before the fiat issues, *Covington v. Hogarth*, 8 Scott, N. R. 725.

Page 112, note 1. As to who may take advantage of the forfeiture, see *Belcher v. Sambourne*, 6 Q. B. 414.

THE FIAT.

Page 113, note 1. The master's signature to the fiat is sufficient evidence without proof of his authority, *Marshall v. Lamb*, 5 Q. B. 115.

Page 114, note 1. But he must be a trader at the time, or if not, must owe a debt contracted during his trading, which will support a creditor's fiat, *ex parte Mitchell*, 1 De G. 257.

Page 123, note 2. And the bankrupt will be allowed his expenses thereby incurred, *ex parte Cheesborough*, 1 De G. 383.

Page 125, note 1. And see *ex parte Woodhead*, 1 De G. 99; and see 7 & 8 Vict. c. 111, s. 19, *post*, vol. 2, p. 440.



Addenda et Corrigenda.

Page 126, note 3. Or, where one bankrupt had died before adjudication, by omitting his name, *ex parte Hall*, 1 De G. 332.

Page 145, note 2. But the petitioning creditor need not aver presentation of bills of exchange and notice of dishonour, *Fletcher v. Manning*, 1 Car. & Kir. 350.

Page 148, note 8. But see *ex parte Potts*, 1 De G. 326.

JURISDICTION OF COMMISSIONERS.

Page 159, note 1. See also *post*, vol. 2, p. 355, note 4; and p. 364; *Watson v. Bodell*, 14 Mees. & Wels. 57; and *ex parte Denney*, 12 Mees. & Wels. 271, 3 G. & D. 640, 1 Dowl. & L. 608.

Page 161, note 9. See also *ex parte Gibbs*, 1 De G. 1.

Page 164, note 6. As to meaning of word "suspected," see *Cooper v. Harding*, 7 Q. B. 928.

Page 165, note 1. But see *ex parte Underwood*, 1 De G. 190.

Page 168, note 1. But the commissioner cannot detain a party summoned until payment of costs, *Watson v. Bodell*, 14 M. & W. 47.

Page 169, note 4. See 8 & 9 Vict. c. 48, *post*, vol. 2, p. 203.

Page 171, note 4. But cannot bring an action against the sheriff, *Magnay v. Burt*, 5 Q. B. 394.

MESSENGER.

Page 184, note 4. But the assignee need not continue his services *Robson v. Jonnesson*, 8 Scott, N. R. 35.

PROOF.

Page 192, note 2. And the costs of a wife's proctor in defending a suit for divorce were held proveable against the husband, *ex parte Moore*, 1 De G. 123.

Page 194, note 7. A principle which has been held to apply where the subject of the security, although nominally the bankrupt's property, is so encumbered that he would have no beneficial interest, supposing the security in question were removed, *ex parte Turney*, 3 M. D. & D. 576.

Page 195, note 2. But see *ex parte Greaves*, 1 De G. 119.

ELECTION.

Page 201, note 2. But not before the fiat issues by taking preliminary steps, *Covington v. Hogarth*, 8 Scott, N. R. 725.

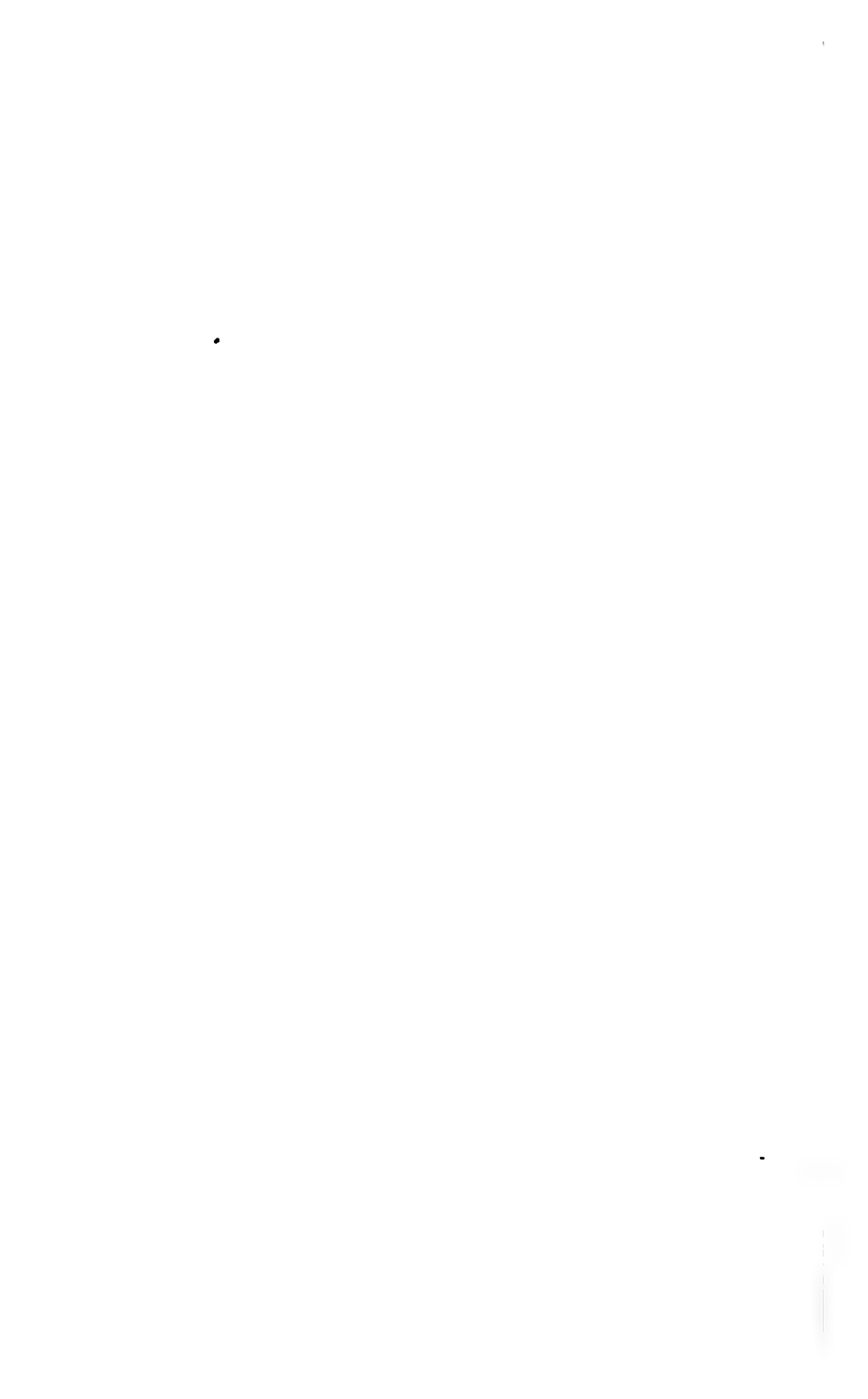
Page 205, note 5. See *Woodward v. Meredith*, 2 Dow. & L. 135.

Page 207, note 5. *Covington v. Hogarth*, 8 Scott, N. R. 725.

Page 213, line 7 from bottom. Insert, "and the word 'or' is not to be construed 'and' in section 2 of the Act, *Green v. Wood*, 7 Q. B. 178."

Page 213, note 3. But execution not levied by reason of possession under prior invalid judgment is sufficient. *Graham v. Wetherby*, 7 Q. B. 491.

Page 216, note 1. But see *Mason v. Bogg*, 2 Myl. & Cr. 443.



Addenda et Corrigenda.

PROOF BY MORTGAGEE.

Page 219, note 1. And if they buy in without order they will be held to the bargain, or to make good the loss at a resale, *ex parte Gover*, 1 De G. 349.

Page 219, note 12. And see *ex parte Bromage*, 1 De G. 375.

Page 220. As to order, when an assignee is the mortgagee, see *ex parte Young*, 1 De G. 146.

Page 220, note 4 (at beginning). All auction duty is repealed by 8 & 9 Vict. c. 15, s. 1, which renders it unnecessary now to discuss such cases as arose in the following authorities.

PROOF.

Page 235, note 3. Instalments were also held proveable, *Lane v. Burghart*, 1 Q. B. 933.

Page 238, note 1. This case, however, was reversed on appeal, *Re Gales*, 1 De G. 100, on the ground that there was only an agreement to purchase at a future time. In *ex parte Megarey*, 1 De G. 167, a debt contingent on the non-admission of a person into partnership was held proveable. A covenant to pay premiums on an assigned policy does not constitute a proveable debt, *Toppin v. Field*, 3 Gale & Davison, 340.

Page 241, note 5. And the principle of this case is not confined to marriage portions, see *ex parte Megarey*, 1 De G. 167.

Page 246, note 9. And all who by possibility may be held *cestui que trustent*, must be before the court, *ex parte Congreve*, 1 De G. 267.

Page 248, note 5. And see *ex parte Thompson*, 2 M. D. & D. 761; *ex parte Bannerman*, Mont. & Ch. 572; *Thompson v. Derham*, 1 Hare, 375; *ex parte Butterfield*, 1 De G.; reversing S. C. 1 De G. 319.

Page 249, note 2. And in *ex parte Montefiore*, 1 De G. 172, the order was extended to the profits made by the trustee by investments. See also as to breach of trust, *ex parte Poulsen*, 1 De G. 79.

Page 255, note 1. But the commissioner cannot value for the purpose of set off, *ex parte Law*, 1 De G. 256.

Page 262, note 1. See *ex parte Harris*, 1 De G. 165.

Page 278, note 7. *Ex parte Hornby*, 1 De G. 71.

Page 303, note 4. As to the effect of this clause, see *Jackson v. Magee*, 3 Q. B. 48.

Page 305, note 7. And *Woolley v. Smith*, 4 Dowl. & L. 469.

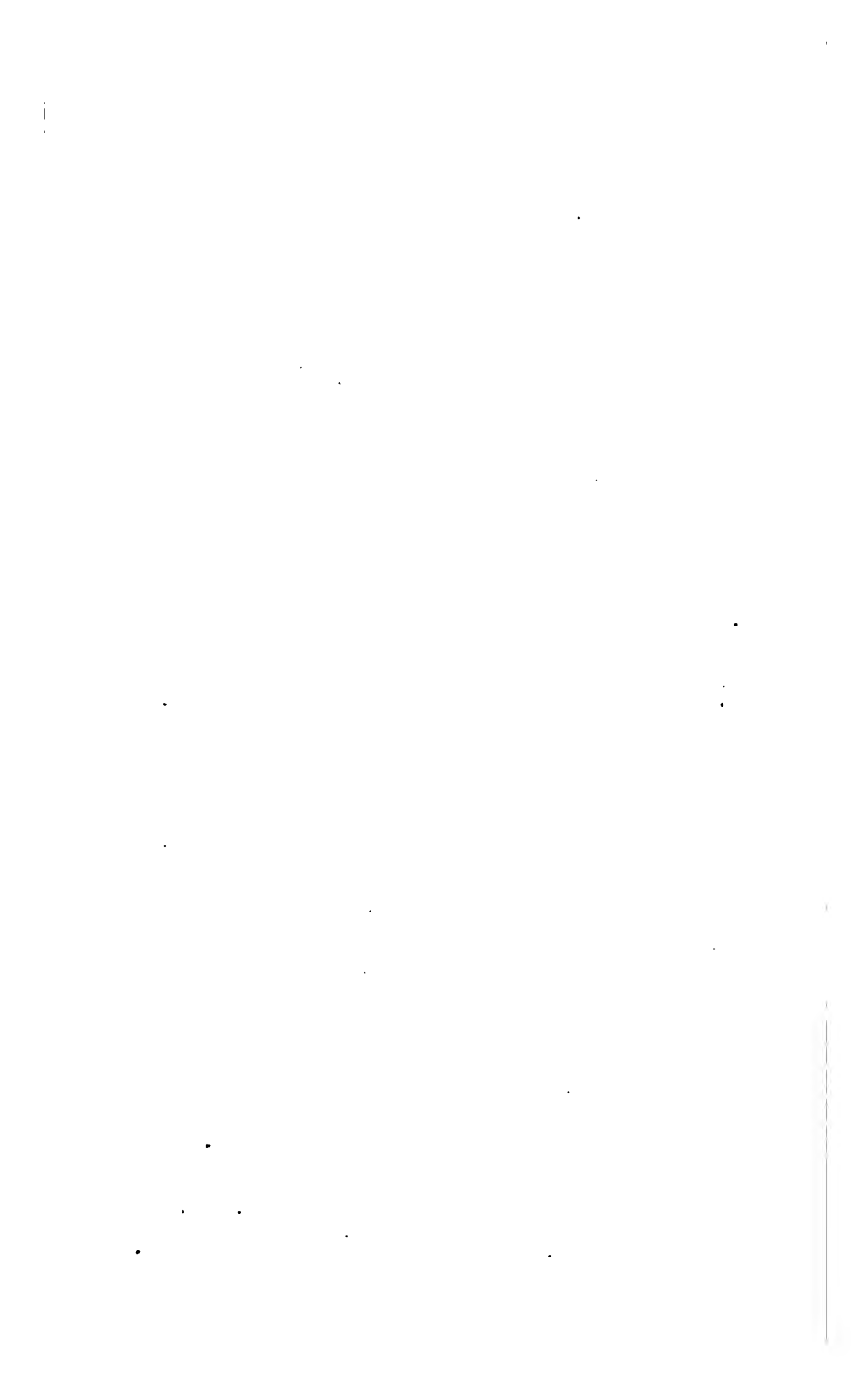
ASSIGNEES.

Page 344, note 2. As to the form of advertisement for compromise, see *post*, vol. 2, p. 376.

Page 348, note 3. But even an official assignee disclaiming in a foreclosure suit where there were no assets, had to pay his own costs, *Clarke v. Wilmot*, 1 Phillips, 276.

Page 352, note 5, beginning. These questions are now obviated by the repeal of the auction duty altogether by 8 & 9 Vict. c. 15.

Page 363, note 1. And see *ex parte Rees*, 1 De. G. 205, and *ex parte Shaw*, *ib.* 242.



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Page 377, note 2. And so of an action, *Lawes v. Bott*, 16 Mees. & Wels. 300.

Page 377, note 4. And see *Whitehead v. Hughes*, 2 Dowl. 258; and *Lawes v. Bott*, 16 Mees. & Wels. 300.

BANKRUPT'S REAL ESTATE.

Page 378, note 9. As to pleading in action on bond, see *Lawes v. Shaw*, 5 Q. B. 322. The court will impound his fees in any bankruptcy, till he has made good his defalcations in others, *ex parte Graham*, 1 De G. 328.

Page 381, note 2. See *Jones v. Geddes*, 14 Sim. 611.

Page 390, note 5. And *ex parte Wise*, Mont. & McA. 65; *ex parte Somerville*, 1 M. & A. 408, 3 D. & C. 668; and *ex parte Tripp*, 1 De G. 293.

Page 402, note 1. But a deed voluntary on the face of it may be shown to be really not so, *Pott v. Todhunter*, 2 Coll. 76.

ESTATE OF BANKRUPT'S WIFE.

Page 413, note 4. But the assignees cannot sue in their own names only, *Sherrington v. Yates*, 1 Dow. & L. 1032.

BANKRUPT'S PERSONAL PROPERTY.

Page 421, note 1. *Whitmore v. Gilmour*, 12 M. & W. 808.

Page 422, note 3. Assignees are entitled to have a usurious contract entered into by the bankrupt set aside in equity on the terms of admitting a proof against the estate for principal and lawful interest, *Belcher v. Vardon*, 2 Coll. 162.

Page 424, note 2. *Rogers v. Spencer*, 13 M. & W. 571; *Brewer v. Dew*, 11 M. & W. 625, 1 Dow. & L. 383.

Page 427, note 1. And see *Kearsley v. Woodcock*, 3 Hare, 185.

Page 428, note 1. But if the proviso be "shall be duly found a bankrupt," the validity of the fiat may be disputed, *Doe v. Ingleby*, 15 M. & W. 465.

Page 438, note 2. And see *Jones v. Geddes*, 14 Sim. 611.

REPUTED OWNERSHIP.

Page 440, note 3. "At the time he becomes bankrupt," refers to commission of act of bankruptcy, and not to issuing of fiat, *Fawcett v. Fearne*, 6 Q. B. 20.

Page 443, note 4. And *Fletcher v. Manning*, 12 M. & W. 571, and 1 Car. & Kir. 350.

Page 444, note 2. Dele *Nelson v. London Assurance Company*, 2 S. & S. 292.

Page 444, note 3. Secus as to shares in the New Zealand Company, *ex parte Barnett*, 1 De G. 194. As to what annuities are within the Act, *ex parte Smyth*, 3 M. D. & D. 687.

Page 445, note 1. But a possession under a deed which is in itself an act of bankruptcy, cannot create reputed ownership, *ex parte Zwilchenbart*, 3 M. D. & D. 671, affirmed on appeal; *Re Marshall*, 1 De G. 273; nor can a possession obtained by fraud,



Addenda et Corrigenda.

as when goods are ordered without an intention of paying for them, *Load v. Green*, 15 Mees. & Wels. 216.

Page 455, note 1. Books deposited with a bookseller to be sold on commission are not in his reputed ownership, *Whitfield v. Brand*, 16 Mees. & Wels. 282.

Page 456, note 1. See *Load v. Green*, 15 M. & W. 216, and conversely in the case of a nominal partner the stock in trade was held to be in the reputed ownership of the nominal firm, *ex parte Arbonia*, 1 De G. 359.

Page 466, note 3. See *ex parte Barnett*, 1 De G. 194.

Page 466, note 1. See *ex parte Kelsall*, 1 De G. 352.

Page 468, note 2. And *re Bromley*, 13 Sim. 475. See also *Thompson v. Speirs*, 13 Sim 469, by which *Duncan v. Chamberlayne* may be considered as overruled.

FRIENDLY SOCIETIES.

Page 486. And *ex parte Harris*, 1 De G. 162. See also *ex parte Haynes*, 3 M. D. & D. 663.

FRAUDULENT DELIVERY.

Page 494, note 3. See *Gibson v. Bruce*, 6 Scott, N. R. 309, 5 M. & G. 199.

Page 496, note 1. *Bevan v. Nunn*, 9 Bing. 107, but see *ex parte Simpson*, 1 De G. 9.

Page 497, note 1. *Aldridge v. Constable*, 4 Q. B. 674; and it is not necessary to show an intention to benefit the creditor, *Marshall v. Lamb*, 5 Q. B. 115.

Page 498, note 6. See *Meggison v. Foster*, 2 Y. & C. C. C. 336, as to what constitutes a voluntary deed.

Page 499, note 3. And although the bankrupt did not intend to benefit and did not benefit the particular creditor, *Marshall v. Lamb*, 5 Q. B. 115, but a payment, though not good against the assignees, may be good to take a debt out of the Statute of Limitations, *Goddard v. Ingram*, 3 Q. B. 839.

Page 502, note 6. *Green v. Bradfield*, 1 Car. & Kir. 449.

Page 504, note 5. And see *ex parte Simpson*, 1 De G. 9; *Green v. Bradfield*, 1 Car. & K. 449.

Page 511, note 4. See *ex parte Molyneux*, 1 De G. 121, affirmed on appeal *Re Humberston*, 1 De G. 263.

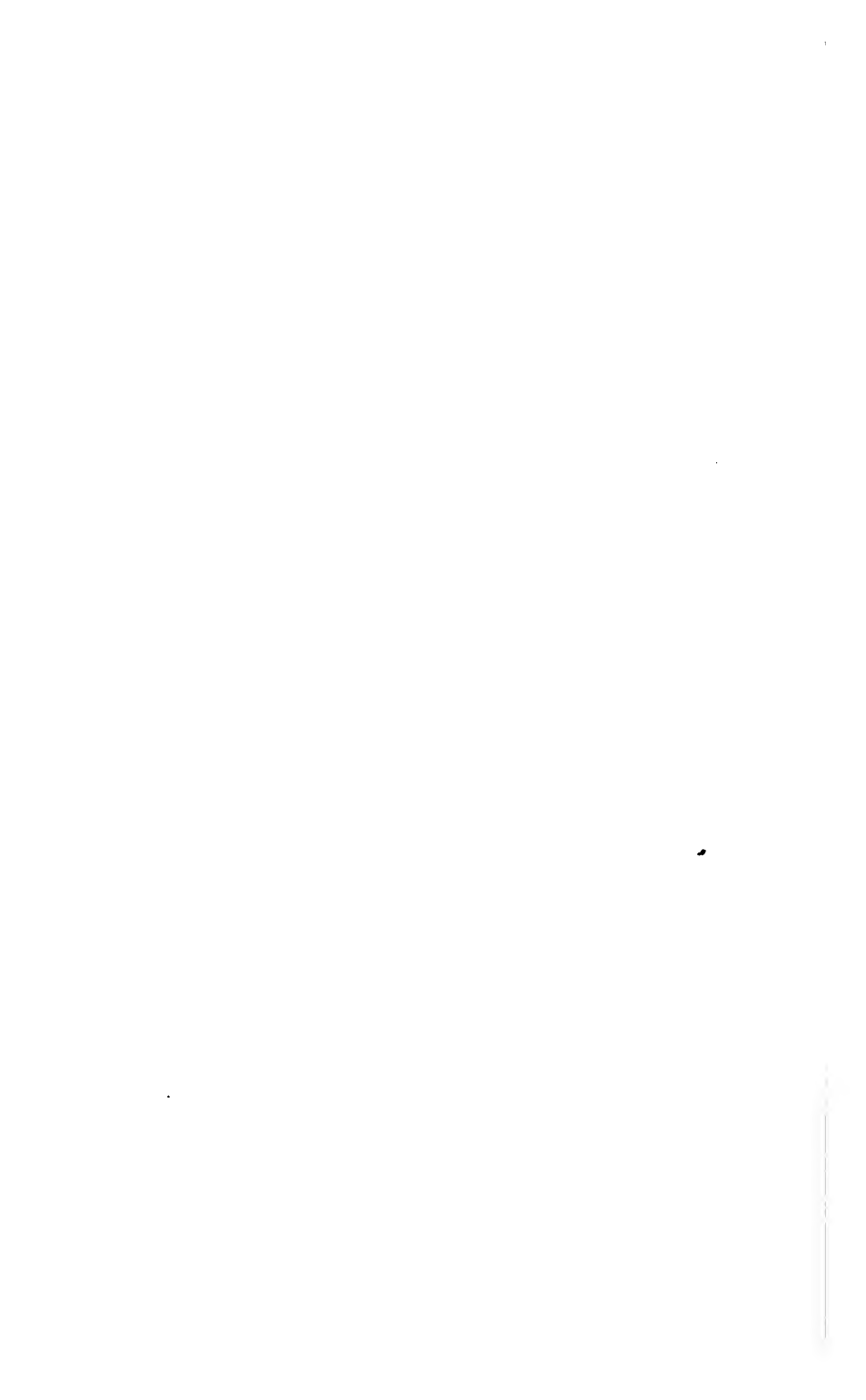
GOODS NOT DELIVERED.

Page 527, note 3. See also *Wilkins v. Bromhead*, 6 M. & G. 963.

LIEN.

Page 530, note 1. And see *Bowman v. Malcolm*, 11 M. & W. 833.

Page 530, note 4. As to agreement for lien on implements of railway contractor, see *Hawthorn v. Newcastle-upon-Tyne and North Shields Railway Company*, 3 Q. B. 734.



Addenda et Corrigenda.

DIVIDEND.

Page 556, note 5. So also where no dividend had been declared for ten years after issuing of fiat, *ex parte Sturton*, 1 De G. 341. Staying the dividend at instance of one creditor lets in others to prove, *ex parte Bowner*, 1 De G. 343.

OF THE BANKRUPT.

Page 571, note 8. But not when the bankrupt's omission to surrender was owing to his having left England to avoid his creditors, *ex parte Perry*, 1 De G. 372.

Page 572, note 6. A petition by a bankrupt to annul may be heard, although he has not surrendered, if when he presented the petition the time for surrendering had not expired, *ex parte Garnett*, 1 De G. 95.

Page 574, note 5. A declaration is substituted for the oath by 8 & 9 Vict. c. 48, see *post*, vol. 2.

Page 576, note 4. But see *ex parte Gibbs*, 1 De G. 1.

Page 587, note 1. But the warrant need not set out any previous examination, *ex parte Danney*, 1 Dow. & L. 608.

Page 587, note 7. *Ex parte Gibbs*, 1 De G. 1.

Page 611, note 6. *Herbert v. Sayer*, 5 Q. B. 165.

Page 612, note 1. And the principle was acted upon in *ex parte Grimstead*, 1 De G. 76.

Page 625, note 3. And if made party the plaintiff must pay his costs, *Pannell v. Hurley*, 2 Coll. 241.

Page 625, note 4. But when the assignees disclaim in a foreclosure suit, the bankrupt is a necessary party, *Singleton v. Cox*, 4 Hare, 326.

Page 671, note 4. But a letter written by the bankrupt in the third person, was held sufficient, *Lobb v. Stanley*, 5 Q. B. 574. The written promise may be made before or after the certificate, but a mere acknowledgment is not sufficient, *Kirkpatrick v. Tattersall*, 1 Car. & K. 577, 13 M. & W. 766.

PARTNERSHIP DEBTS.

Page 690, note 3. As to what form of promissory note binds the firm, see *ex parte Clarke*, 1 De G. 153, affirming *ex parte Christie*, 3 M. D. & D. 736.

Page 695, note 3. And so of a nominal partner, *ex parte Arboin*, 1 De G. 359.

Page 725, note 3. See *Kynaston v. Couch*, 14 M. & W. 266; *Green v. Bradfield*, 1 Car. & K. 449.

RELATION TO ACT OF BANKRUPTCY.

Page 731, note 5. A fraudulent deed which could not have been impeached under any creditor's fiat, cannot be impeached under one sued out by the bankrupt, *ex parte Philpott*, 1 De G. 346.

Page 739, note 4. And see *Bowman v. Malcolm*, 11 M. & W. 833; *Pariente v. Pennell*, 2 Moo. & Rob. 517; and as to a distress, *Lackington v. Elliott*, 8 Scott, N. R. 275.

Addenda et Corrigenda.

Page 742, note 2. See *Linnit v. Chaffers*, 4 Q. B. 762; *Whitmore v. Greene*, 13 M. & W. 104; *Skey v. Carter*, 11 M. & W. 571; *Lackington v. M^r Lachlan*, 5 Scott, N. R. 874; *Goldschmidt v. Hamlet*, 6 Scott, N. R. 962; *Goldschmidt v. Hamlet*, 1 Dowl. & L. 501; *Pinches v. Harvey*, 1 Q. B. 868; *Belcher v. Magnay*, 12 M. & W. 102, 3 Dowl. N. S. 441; *Leake v. Loveday*, 5 Scott, N. R. 908; *Johnson v. Evans*, 1 Dowl. & L. 935; *Cheston v. Gibbs*, 3 Dowl. N. S. 420; *Johnson v. Evans*, 7. M. & G. 240, 7 Scott, N. R. 1035.

Page 749, note 5. And see *Bird v. Bass*, 6 Scott, N. R. 928, 6 M. & G. 143.

Page 750, note 2. But knowledge by a creditor that a bill of sale comprised all the property, held sufficient notice, *Lindon v. Sharpe*, 7 Scott, N. R. 730.

Page 750, note 4. But a letter by the bankrupt stating that he had committed several acts of bankruptcy, held sufficient notice, *Udal v. Walton*, 14 M. & W. 254.

Page 757, note 4. *Bittleston v. Timmis*, 2 Dowl. & L. 817, 1 C. B. 389; *Alsager v. Currie*, 12 M. & W. 751.

ACTIONS AND SUITS BY AND AGAINST ASSIGNEES.

Page 777, note 4. And if made a party he is entitled to his costs, *Pannell v. Hurley*, 2 Coll. 241.

Page 778, note 1. If assignees disclaim equity of redemption of term in foreclosure suit, the bankrupt is, it seems, a necessary party, *Singleton v. Cox*, 4 Hare, 326.

Page 778, note 4. Under 6 Geo. 4, c. 16 and 1 & 2 Will. 4, c. 56, the name of the new assignee is substituted on motion, *Man v. Ricketts*, 7 Bea. 484; *Lloyd v. Waring*, 1 Coll. 536.

Page 779, note 1. Interest after bankruptcy on a balance is recoverable by assignees, *Pott v. Bevan*, 1 Car. & Kir. 335.

Page 804, note 4. When one plaintiff becomes bankrupt, the court on a motion to dismiss may order the plaintiffs to supply the defect within a limited time, *Ward v. Ward*, 8 Bea. 631.

Page 805, note 4. See also *Whitmore v. Oxborrow*, 1 Coll. 91.

Page 805, note 5. When supplemental bill filed, process to compel bankrupt to answer original bill irregular, *Robertson v. Southgate*, 5 Hare, 223.

EVIDENCE.

Page 809, note 1. Section 90 applies to commissioners before the passing of the Act, *Doe v. Liversedge*, 11 M. & W. 517.

ANNULLING.

Page 856, note 7. It has been dispensed with when the commissioner refused to certify, because the office fees of £10 and £20 had not been paid, and there had been no choice of assignees, *ex parte Diamond*, 1 De G. 143; *ex parte Miller*, 1 De G. 144; *ex parte Green*, 1 M. D. & D. 174; and see *ex parte Davis*, 1 De G. 267. *Secus*, where there has been a choice of assignees, *ex parte Nicholls*, 1 De G. 331, but the whole subject of these fees is now under the consideration of the Lord Chancellor, on an appeal.



Addenda et Corrigenda.

Page 860, note 3. *Contrà ex parte Austin*, 1 M. D. & D.; *ex parte Garnett*, 1 De G. 95; *ex parte Hodson*, 1 De G. 374.

Page 862. And so has a consent to an early advertisement of the bankruptcy, *ex parte Gould*, 1 De G. 29.

Page 863, note 6. *Ex parte Burbidge*, 1 De G. 256.

Page 865, note 10. And so if a creditor petition to annul for want of trading when he has before opposed the bankrupt's relief in insolvency, on the ground of trading, *ex parte Mitchell*, 1 De G. 257.

Page 873, note 4. And see *ex parte Anjer*, 2 D. & C. 67; and *ex parte Lawrence*, 1 De G. 269.

PRACTICE ON PETITIONS.

Page 880, line 2. Dele "or by leaving it," &c. to the end of the sentence, including the references.

Page 881, note 4. For 1 Mad. 395, read 4 Mad. 395.

Page 881, note 14. But examinations of third parties before the commissioners cannot be read against the bankrupt, see *ex parte Chambers*, 2 M. & A. 465, *ex parte Rees*, 1 De G. 205.

Page 898, note 1. Whether commitment for contempt is the subject of appeal, *quære*, see *ex parte Van Sandau*, 1 De G. 55.

Page 899, note 6. See *ex parte Van Sandau*, 1 De G. 55.

COSTS.

Page 902, note 7. And see *ex parte Shaw*, 1 De G. 242.

Page 902, note 10. And when no creditor's assignees are chosen, nor are likely to be, the costs will be paid, though enough would not remain to pay the office fees of £10 and £20, *ex parte Pater-son*, 1 De G. 158; *ex parte Teague*, 1 De G. 140. And though it is the bankrupt's own fiat, *ex parte Buchanan*, 1 De G. 344; and *ex parte Jerwood*, 1 De G. 373. And where the office fees had been paid, the Court of Review has ordered them to be returned, *ex parte Reynolds*, 1 De G. 373. *Secus*, where assignees have been chosen, *ex parte Hopkins*, 1 De G. 204. The whole question of these fees has been argued before the Lord Chancellor, and awaits his lordship's decision.

Page 903, note 3. And so may the solicitor of a bankrupt suing out a fiat against himself, *ex parte Parsons*, 1 De G. 342.

THE SOLICITOR.

Page 922, note 7. But was allowed to be a purchaser upon terms in *ex parte Watts*, 1 De G. 265.

Page 929, note 4. *Ex parte Brutton*, 1 De G. 116.

Page 933, note 1. But application must be made within twelve months, see 6 & 7 Vict. c. 73, s. 42, *post*, vol. 2, p. 174. As to what amounts to a payment, see *ex parte Rees*, 1 De G. 205.

Addenda et Corrigenda.

BANKRUPTCY OF PUBLIC COMPANIES.

Page 951. After the three divisions of the companies coming under the operation of the Act, add, "To which the Act 7 & 8 Vict. c. 113, s. 48, has added another description of company, viz.:—

4. Every company of more than six persons carrying on the trade or business of bankers in England."

Page 952. Insert the following note : In addition to the acts of bankruptcy, mentioned in this Act, it is now provided by 9 & 10 Vict. c. 28, ss. 23, 27, and 28, that a dissolution of a company may be an act of bankruptcy, if the meeting called under the provisions of that Act so decides ; and that a fiat may be sued out thereupon against the company on the petition of any three members of the committee, or of any creditor, or on the production of a copy of the *Gazette* containing the resolution. See vol. 2, p. 453.

In the references to vol. 2, the reader is requested to erase the word *Appendix* throughout except in p. 954.

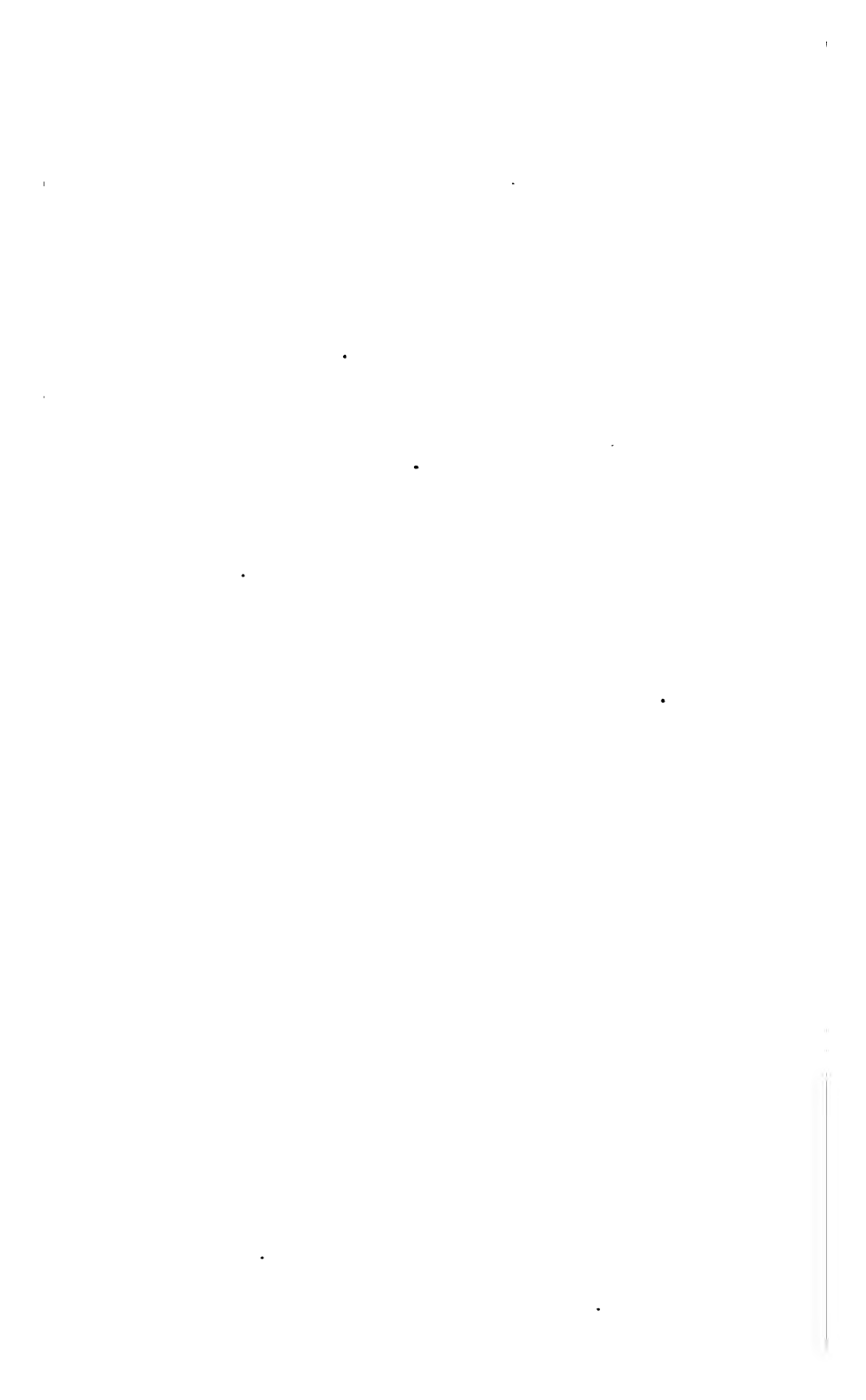


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INTRODUCTION.

THE word *Bankrupt*, we are told by Mr. Justice Blackstone,¹ is derived from the word *bancus*, or *banque*, which means the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one whose shop or place is broken and gone: whilst Sir Edward Coke,² somewhat more quaintly, and certainly with greater metaphor, prefers the derivation of it from the two French words *banque* and *route*; which last word, he informs us, means “a sign or mark, as we say a *cart-rout*, which is the sign or mark where the cart hath gone; so, metaphorically, it is taken for him that hath wasted his estate, and removed his *banque*, so as there is left but a mention thereof.” The origin of the word, however, unless it is to gratify the curiosity of the etymologist, does not seem to be very material to the present inquiry, when the meaning of it has been so copiously defined by the acts of the Legislature, and by the numerous decisions of our courts of justice; though, if there be a choice to be made between these two learned authors the, first derivation appears to be the more simple and appropriate. It accords, too, with the custom which formerly prevailed among the bankers in the towns of Italy, who used to carry on their business in the public places seated on forms, with benches to count their cash, and of whom if any one became insolvent, his

¹ 2 Comm. 471.

² 4 Inst. 277.

bench was *broken*, either as a mark of infamy, or to put another in its place.¹

A Bankrupt, by our old law, was considered in the light merely of a criminal or offender; the 34 & 35 H. 8, c. 4, (which was the first statute passed concerning them) describing Bankrupts as "persons craftily obtaining into their hands great substance of other men's goods, who suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for *their own pleasure and delicate living*, against all reason, equity, and good conscience."² But now the law of Bankruptcy is considered principally with a view to the benefit of trade; and, instead of treating the Bankrupt as a criminal, holds out to him relief and protection against the consequences of his imprudence or misfortune, provided he acts but honestly with his creditors, and gives up all his effects to their use, without any fraudulent concealment.

The law of *England*, says Mr. Justice Blackstone, in this respect has steered between the two extremes of the old Roman, and the civil law; by the former of which the debtor might be either imprisoned in chains, and subjected to stripes and hard labour at the mercy of his creditor, or sold with

¹ Dufresne, 1, 969. Beawes, 322. In favour of Sir Edward Coke's derivation, however, it is but fair to remark, that the title of the first English statute relating to the subject (34 & 35 H. 8, c. 4), was "against such as do make bankrupt," which is a literal translation of the French idiom, "qui font banque route."

² The original statute that was made against bankruptcy as a crime (but which does not appear in our statute book), Sir Edward Coke says (4 Inst. 277), was against the Lombards, who, after they had made obligations to their creditors,

suddenly escaped out of the realm, without having come to any agreement with them. Neither do we find, he adds, any complaint in parliament, or Act of Parliament made, against any English bankrupt, until the 34 H. 8, "when the English merchant had rioted in three kinds of costliness, viz., costly building, costly diet, and costly apparel, accompanied with neglect of his trade and servants, and thereby consumed his wealth." One would really imagine, that the learned commentator had been describing some transactions in the nineteenth century.

his wife and children to perpetual foreign slavery *trans Tiberim*; and by the latter (so opposite was the spirit of the two laws), the debtor could not even be compelled to cede or give up what property he had in his possession, if he would only swear that he had not sufficient left to pay his debts.¹ The law of this country provides equally against the inhumanity of the creditor and the fraud of the debtor, and adopts in a great measure the principle of the law of the *cessio bonorum* introduced by the Christian emperors; whereby, if a debtor ceded or yielded up all his fortune to his creditors, he was secured from being dragged to prison, "*omni quoque corporali cruciatu semoto.*"² The protection of the Bankrupt Law is, however, only afforded to actual *traders*; who are, in general, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. Trade (in the words of the learned author of the *Commentaries*) cannot be carried on, without mutual credit on both sides; the contracting of debts is, therefore, not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother-traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune, and not his fault. To the misfortune, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every trader may be declared a Bankrupt, for the benefit of his creditors, as well as himself,—it has also, to discourage extravagance, declared, that no one shall be capable of being made a Bankrupt but *only a trader*; nor capable of receiving the full benefit of its provisions, but only an *industrious* trader.

In treating of the law, as it now stands, regarding Bankrupts, there seems to be no necessity for enumerating the

¹ Inst. 4, 6, 40. Nov. 135, c. 1.

² Cod. 7, 71.

various Acts of Parliament which have been from time to time passed respecting them, all of which were more or less in operation before the 6 Geo. 4, c. 16, began to take effect. They were no less than twenty-one in number; and were all repealed by the first section of that statute, beginning with the 34 & 35 H. 8, c. 4, and ending with the 5 G. 4, c. 98. The alterations made by that statute, as well as by the subsequent statutes of 1 & 2 W. 4, c. 56, and 5 & 6 Vict., c. 122, in the law of Bankruptcy, are very considerable, embracing almost every branch and division of the former Bankrupt law. The persons liable to become Bankrupt are increased in number, and are more particularly defined; new modes of committing an act of Bankruptcy are specified; more ample powers are given to the Lord Chancellor; a new tribunal, in Bankruptcy, has been established both in London and the country, for the ostensible purpose of saving expense and delay to all the parties who have an interest in the Bankrupt's property; and more authority is given to the Commissioners, both with respect to the Bankrupt, as well as over other persons whom it may be necessary to examine touching the act of bankruptcy, and the discovery of the Bankrupt's property. These, and various other alterations, will be pointed out in the following pages, according to the order in which the different subject-matters are successively disposed of.

CHAPTER I.

OF THE JURISDICTION OF THE LORD CHANCELLOR, AND THE COURT OF REVIEW.

SECT. 1. *Of the general Jurisdiction of the Lord Chancellor.*

2. *Of the Jurisdiction of the Court of Review.*

3. *Of the Jurisdiction over the Parties to, or those
who come in under, the Fiat.*

4. *Over those who are Strangers to the Fiat.*

SECTION I.

Of the general Jurisdiction of the Lord Chancellor.

Nature and origin of the jurisdiction.] With respect to the nature and origin of the lord chancellor's jurisdiction in bankruptcy, the matter does not appear to be involved in quite so much obscurity and mystery as a learned writer on the subject has alleged to be the case.¹ The first statute that gave him any jurisdiction was the 34 & 35 H. 8, c. 4, which gave also equal authority to the lord treasurer, and other great officers of state; any one of whom, together with two members of the privy council, or the two chief justices of either bench, might take such order and direction, as well with the body as the property of the bankrupt, as to their wisdom or discretion might seem fit. But ever since the 13 Eliz. c. 7, which conferred upon the lord chancellor or lord keeper of the great seal the exclusive authority to issue a commission of bankrupt, the great seal appears to have been in the sole and entire possession of all jurisdiction in matters of bankruptcy, upon which it determines in a summary way, and from its decision there is no appeal.² The twelfth section of the 6 G. 4, c. 16 (following the words nearly of the 13 Eliz. c. 7), also gave the lord chancellor power to issue a commission to such persons as to him should seem fit, who were to take the same order and direction, both with the

¹ 2 Christian's B. L. 6.

¹ V. & B. 211. Ex parte Bryant,

² Ex parte Matthews, 3 Atk. 816. Ex parte Hall, 1 Rose, 13.

bankrupt's person and estate, as was specified in the former statute; and by *section 135*, if there was no lord chancellor, then all powers and duties, given to and directed to be performed by him, were in that case to be performed and exercised by the lord keeper, or lords commissioners, of the great seal.

To every person (says Sir W. Evans, in his letter to Sir Samuel Romilly, on the revision of the Bankrupt Laws),¹ who compares the very few provisions in the statute-book respecting this extensive jurisdiction, with the numerous cases in the books of reports upon the exercise of it; who compares the terms in which the authority is given, with the extent to which it is carried;—it must be an obvious remark, that never, upon so narrow a basis, was there erected so large a superstructure of authority, undefined, exclusive and without appeal. But a considerable part of this authority, as well, indeed, as of the present jurisdiction exercised by courts of equity in a variety of subjects, may be traced (as that learned writer observes) to the principle, that every court is conclusively the judge of its own contempts; and therefore, when any authority is assumed, and the disobedience of it is treated as matter of contempt, the consequence is, an indirect power of legislation, which no other tribunal is competent to control. This principle, however, which in its nature is so very susceptible of abuse, has been in general applied to beneficial purposes; and the chancellor's jurisdiction in bankruptcy appears to have been fully recognised by repeated acts of the legislature, as well as by a long series of judicial decisions.²

It has been remarked by Lord Eldon,³ that the different statutes relating to bankrupts seem to have been framed with a view to the authority with which the lord chancellor is entrusted in the exercise of his ordinary jurisdiction; and that when those statutes were silent, as to the mode of compelling

¹ Page 182.

² Mr. Christian (vol. ii. 212, 226), referred great part of the chancellor's jurisdiction in bankruptcy to the mere influence of recommendation and advice, and the indirect control which he possessed over the former commissioners, by means of his patronage, and his power of refusing to insert their names in other commissions: this the learned author consequently infers to be, and designates, as a recommendatory jurisdiction, as distinguished from the mandatory jurisdiction

expressly given by statute. But though this influence might operate in derogation of the power of the commissioners, it does not seem so very clear how it could increase that of the chancellor, who, before he was enabled by the 13 Eliz. c. 7, to delegate a part of his authority to the commissioners, was clothed with more ample powers by the preceding statute of 34 & 35 H. 8, which the statute of Elizabeth left free and untouched.

³ 14 Ves. 451. *Ex parte Bradley*, 1 Rose, 203, 204.

obedience to the orders that might be necessary for carrying their provisions into effect, the practice has been to enforce it by the *general jurisdiction* of the court of Chancery, without which the objects of a commission of bankrupt could not in many cases be thoroughly attained; and this practice, he thought, was perfectly consistent with the intention of the legislature, in giving the jurisdiction it has done to the chancellor in bankruptcy. Indeed, it has been laid down in many cases, that an order of the lord chancellor in bankruptcy is analogous, though not equal, to a decree of the court of chancery,¹ and that he is not liable to an action in respect of an order of commitment made by him in bankruptcy, even though such order may have been irregular.²

The whole of the chancellor's jurisdiction in bankruptcy, except in the issuing of the fiat, and in matters of appeal, is now, as we shall presently see, transferred to another court; and though he has still power to annul a fiat, yet he has no jurisdiction to do so except by way of appeal.³

SECTION II.

Of the general Jurisdiction of the Court of Review.

Before we proceed further in our remarks as to the jurisdiction in bankruptcy, it will be proper to notice some of the provisions of the 1 & 2 W. 4, c. 56, by which the greater part of the chancellor's jurisdiction was transferred to an entirely new-constituted tribunal, called "The Court of Review," which originally consisted of four judges, afterwards reduced (by the 5 & 6 W. 4, c. 29, s. 21) to three, and now in effect (by the 5 & 6 Vict. c. 122, s. 64) to one, who still however retains the title of "the chief judge of that court." It is deemed to be a court of law and equity,⁴ with all the rights, incidents and privileges of a court of record,⁵ as fully as the same are exercised by any of the courts of law at Westminster; and the judges of the court take rank and precedence⁶ next after the judges of the superior courts.

It is also declared to have superintendence and control in all matters of bankruptcy,⁷ and to have power to hear and determine all such matters in bankruptcy, as were usually

¹ *Flower v. Herbert*, 2 Ves. 326.
Ex parte Cowan, 3 B. & A. 129.

² *Dicas v. Lord Brougham*,
1 Mood. & R. 309.

³ Ex parte Stubbs, 3 Dea. 549,
overruling ex parte Keys, 3 D. & C. 263.

⁴ 1 & 2 W. 4, c. 56, s. 1.

⁵ And see 5 & 6 W. 4, c. 29,
s. 25.

⁶ 5 & 6 Vict. c. 122, s. 65.

⁷ Sect. 2.

brought, by petition or otherwise, before the lord chancellor, whether such matters may have arisen in the court of Bankruptcy, or elsewhere. All these matters are directed to be brought on by way of petition,¹ motion, or special case, subject to an appeal to the lord chancellor, on matters of law and equity, or on the refusal or admission of evidence only; which appeal must be on a special case, except the lord chancellor shall otherwise direct; and the special case is required to be approved and certified by one of the judges of the court, whose determination on the settlement of such case is declared to be final and conclusive.

The court is also empowered to direct any issue² of fact arising therein to be tried either before one of the judges of the court, or before a judge of assize; and may issue process to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the court, and to that end to exercise all the powers vested for such purposes in any of the courts at Westminster. All costs of suit³ also between party and party in the court are declared to be in its discretion, and to be taxable by a master in chancery; but by the subsequent enactment of 3 & 4 W. 4, c. 47, such costs are now taxable by one of the registrars or deputy-registrars of the court. The judges of the court, with the consent of the lord chancellor, are authorized from time to time to make general rules and orders⁴ for regulating the practice of the court of Bankruptcy, the sittings of the judges and commissioners, and the conduct of the other officers and the practitioners. And in all cases where power is given to any one of the commissioners to act, it may be in like manner exercised,⁵ by the chief judge, or any other judge of the court of review, as occasion may require. The judges were likewise empowered to cause to be made a seal⁶ of the court, and to cause to be sealed therewith all such proceedings and documents as should be required to be sealed.

On every appeal to the court of review touching any decision in matter of law upon the whole merits of any *proof*

¹ Sect. 3.

² Sect. 4.

³ Sect. 5.

⁴ Sect. 11. And see Appendix, vol. 2. The intent of the Act, as appears from the 1st and 2nd sections, was to transfer all the former jurisdiction in bankruptcy to the court of review, except the mere issuing or annulling of the fiat, subject to an appeal only to

the lord chancellor. It seems therefore, an extraordinary anomaly, after the power thus given to it, that the 11th section should prevent it from making any rule or order to regulate its own practice, its own sittings, or the conduct of its own officers, except with the consent of the lord chancellor.

⁵ Sect. 21.

⁶ Sect. 28.

of debt,¹ the order of the court is final and conclusive, unless an appeal to the lord chancellor be lodged within one month from such determination.

After any issue authorized by the act shall be tried, a new trial² may be moved in the court of review, which is to be granted or refused according to the rules of the common law, and the practice of the courts of Westminster.

The court also has power to remove any assignee³ of the bankrupt's estate; which order is not subject to any review by the lord chancellor, or otherwise; and if the assignees agree to refer any matter to arbitration, the agreement of reference may be made a rule of the court of Bankruptcy, and thereupon all such rights and remedies will accrue, as upon any submission of reference made a rule of any other court of record.⁴

No judge or other officer of the court is capable of being a member of the House of Commons.⁵

Appeal to the House of Lords.] In case the lord chancellor shall deem any matter of law or equity, brought before him by way of appeal from the court of review, to be of sufficient difficulty or importance to require the direction of the House of Lords, or in case both parties in any proceeding before the court of review shall desire that any such matter may be determined in the first instance by the House of Lords, and not by the lord chancellor, then the lord chancellor, or the court of review, may direct the whole facts whereupon such question of law or equity shall arise, to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House in like manner as other appeals. Such appeals, however, from the lord chancellor must be confined, in matter of fact, to setting forth the special case brought up to the lord chancellor from the court of review, and in cases of appeal from the court of review, to setting forth a special case, to be approved and certified in the same manner as on an appeal to the lord chancellor, and to such argument on the point of law as the parties may be advised to state.

Jurisdiction over the commissioners.] By 5 & 6 W. 4, c. 29, s. 25, every contempt of a commissioner sitting alone, and acting in execution of the duties imposed upon him as such commissioner, is cognizable by the court of review, to

¹ 1 & 2 W. 4, c. 56, s. 32. And see post; "Proof of debt."

² Sect. 33.

³ Sect. 36.

⁴ Sect. 43.

⁵ 1 & 2 W. 4, c. 56, s. 60.

which the same may be referred by any such commissioner, and the court has full power to deal with the same as a contempt of the court of review.

The court can reverse the decision of a subdivision court on a matter of fact as to expunging a proof, notwithstanding the provision of the 1 & 2 W. 4, c. 56, s. 30; for that section is confined to the examination of the bankrupt, and to a *proof* of debt, not to *expunging* a proof.¹

The court has jurisdiction also to make an order of reference to any commissioner acting in the prosecution of a fiat, to inquire into any matter relating to the bankruptcy, and to report the result of his inquiries for the consideration of the court.²

Annulling the fiat.] The court of review also has jurisdiction to entertain a petition to make an order for annulling the fiat; for, although the 17th section of the 1 & 2 W. 4, c. 56 authorizes the lord chancellor to rescind or annul the fiat for any cause he may think fit, yet this provision does not give him jurisdiction to do so, except by way of *appeal*, after a petition for annulling has been heard and disposed of by the court of review. Indeed, after the powers given to the court of review by the 2nd section of the act, and no exception as to those powers in favor of questions respecting the fiat, it cannot be supposed that the act intended to reserve to the lord chancellor any jurisdiction over all such questions; more especially as petitions for superseding commissions constituted so large a part of the business in bankruptcy, which it was the intention of the act to transfer to the court of review.³

SECTION III.

Of the Jurisdiction over the Parties to, or those who come in under, the Fiat.

Before the passing of the Bankruptcy Court Act, the summary jurisdiction of the lord chancellor in bankruptcy was confined strictly to transactions relating to the bankruptcy; that is to say, to those arising between the *bankrupt*, or the *assignees*, and the *creditors* who had come in under

¹ Ex parte *Baldwin*, 1 M. & A. 615.

² Ex parte *Steward*, 3 M. D. & D. 405. And see ex parte *Rolfe*, 2 Den. 421.

³ Ex parte *Stubbs*, 3 Dea. 549, overruling ex parte *Keys*, 3 D. & C. 263. And see *Re Chambers*, 4 D. & C. 578.

the commission. The lord chancellor, therefore, sitting in bankruptcy, could not, upon petition, adjust any demands that one assignee might set up against another, concerning a private agreement between themselves, and not affecting the rest of the creditors.¹ Neither could he compel the assignees to perform an agreement respecting a distribution of the bankrupt's property under a composition deed.² So, in a subsequent case it was determined that the court of review had no jurisdiction to compel a specific performance by the assignees of an agreement entered into by the bankrupt, before his bankruptcy, to take a lease upon certain terms.³ And, though in another case it was held, that, upon the sale of the bankrupt's mortgaged property under the general order, the court had jurisdiction to enforce a specific performance of the contract by⁴ the purchaser, yet in a subsequent case it was decided, that the court of review had no such jurisdiction.⁵ Where certain parties were ordered to pay costs in bankruptcy, and some of them paid the whole costs, it was held, that the chancellor had no jurisdiction in bankruptcy to *order contribution* from the rest of the parties,—that being a question altogether collateral to the bankruptcy, and the proper subject of an action at law, or a bill in equity for an apportionment.⁶ And where the bankrupt had deposited with A. the title-deeds of premises which he had previously mortgaged to R. & Co., and after the bankruptcy it was agreed between R. & Co., A., and the assignees, that the assignees should sell the premises, and apply the proceeds in payment of R. and Co. and A.; and the solicitor of the bankrupt claimed a lien, on petition, by deposit of the title-deeds prior to A.; it was held, that there was no jurisdiction in bankruptcy to determine the priority of this lien, as it was a question in which the estate of the bankrupt had no interest; it being quite immaterial to the general creditors, whether the surplus produce of the property mortgaged was applied to pay the particular debt of A., or the particular debt of the petitioner: and it was also held in this case, that A. was not precluded from objecting to the jurisdiction, by filing affidavits as to the merits.⁷ But where there has been an abuse in the execution of an order made for the sale of property under an

¹ Per Lord Hardwicke, in matter of *Earl of Litchfield*, 1 Atk. 88.

² Ex parte *Barfit*, 12 Ves. 15.

³ Ex parte *Lucas*, 3 D. & C. 144. And see *Re Moseley*, 2 Molloy, 454, where a similar point was decided by Lord Manners.

⁴ Ex parte *Barrington*, 4 D. &

C. 461, confirming Ex parte *Sidbotham*, 3 D. & C. 818, and 4 D. & C. 693.

⁵ Ex parte *Cutts*, 3 Dea. 242.

⁶ Ex parte *Wilmshurst*, 1 G. & J. 4.

⁷ Ex parte *Allison*, 1 G. & J. 210.

equitable mortgage, the court of review has jurisdiction to entertain a petition complaining of such abuse, provided it is the petition of a creditor, or party interested in the bankrupt's property, and who also is a party aggrieved.¹ Any thing, however, that it was necessary for the chancellor to decide, in order to the question of proof of debts under the commission, was held to give him jurisdiction.²

The lord chancellor had power also, when difficult questions of law were found to be involved in a petition in bankruptcy, to send a case for the opinion of a court of law; or, if a difficult question of fact occurred, then to direct an issue to try any litigated point between the parties, or an action to be brought by one against the other.³ So, he might in a matter of importance direct a bill in chancery to be filed, in order to ascertain whether a debt was due or not;⁴ for, though he had no more power on a bill, than on a petition, yet, in some cases, it was thought better that questions of importance requiring solemn discussion should be brought before the court by way of bill; there being an appeal from his decision in this form of proceeding to the House of Lords, which there was not then in proceedings in bankruptcy.⁵

The jurisdiction of the lord chancellor in bankruptcy was held to be both legal and equitable,⁶ arising more from long practice, perhaps, than from any precise authority on the subject; and his determinations were guided, not as Lord Hardwicke once said, by way of analogy to the usual and ordinary proceedings of the court of chancery,⁷ but by certain established rules and principles of equity, which had been adopted in proceedings in bankruptcy, and were deduced from the powers that had been from time to time vested in him by the legislature. The whole of the proceedings in bankruptcy begin in transactions upon *oath*; the trading, the debt, the act of bankruptcy, and the subsequent proceedings, are always originally on affidavit; and it is always in the discretion of the court, upon directing an issue, to direct the petitioning creditor, or the bankrupt, or any other party to the petition, to be or not to be examined, upon oath.⁸

¹ *Ex parte Columbine*, 2 M. D. & D. 24.

² *Ex parte Rowton*, 1 Rose, 19.

³ *Ex parte Cottrell*, Cowp. 742. *Ex parte Gulston*, 1 Atk. 139.

⁴ *Clarke v. Capron*, 2 Ves. jun. 666.

⁵ *Bromley v. Goodere*, 1 Atk. 76. *Hankey v. Garratt*, 1 C. B. L. 2.

Curtis v. Ashton, *ibid*.

⁶ *Ex parte Dardney*, 15 Ves. 496. *Ex parte Hanson*, 12 Ves.

348. *Ex parte Raffey*, 19 Ves. 469.

Ex parte Hilton, 1 Jac. & W. 470.

⁷ *Ex parte Mathews*, 3 Atk. 817.

⁸ *Ex parte Heywood*, 1 Rose, 45; and see *Ex parte Smith*, 19 Ves. 473.

The chancellor had jurisdiction to control the conduct of the commissioners in all matters, where the legislature had fixed no certain time for acts to be done by them; he had, therefore, power to suspend the execution of the assignment after assignees had been chosen; and he had also power to remove the persons nominated by the creditors as assignees, even before the assignment was executed.¹ But though an appeal, generally speaking, lay in all matters of bankruptcy from the determination of the commissioners to the lord chancellor, by petition,² yet if the commissioners committed a bankrupt for not answering to their satisfaction, the lord chancellor, it has been held, could not upon a summary application, *sitting in bankruptcy*, discharge him; but that the proper mode of proceeding was by *habeas corpus*, which writ the chancellor has authority to issue in the vacation time,³ and upon the return to which he could then, not under the bankrupt law, but as a law-officer, review the conduct of the commissioners, the same as any other judge.⁴ The chancellor had also no authority to compel the commissioners to declare a party a bankrupt, but could only order them to proceed in their judgment.⁵ And though he might order a *bill* to be filed for certain purposes in bankruptcy, yet, upon a bill filed by the assignees against a creditor to have the proof of his debt expunged, the chancellor could not, in this mode of proceeding, reverse the order of the commissioners; the proper course being, not by a *suit* in chancery, but by petition to the chancellor sitting in *bankruptcy*.⁶ So, where a bill was filed against bankrupts and their assignees, questioning the validity of the commission, and praying an account,—or, if the commission was legal, for leave to prove what should appear to be due under the bankruptcy,—it was for the same reason held bad on general demurrer.⁷ And so also a bill by assignees against a bankrupt, to restrain him from further proceedings at law to impeach the validity of the commission, was held equally untenable.⁸ But Lord Eldon, in a subsequent case, dismissed a petition to this effect,

¹ *Ex parte Shaw*, 1 G. & J. 127.

² *Bromley v. Goodere*, 1 Atk. 77.

³ *Crowley's case*, Buck. 264.

⁴ *Ex parte King*, 11 Ves. 425. Lord Hardwicke, however, leaned to a different opinion upon this question, and said, that he remembered a similar case before Lord Chancellor King in *bankruptcy*, who, after he had taken some time to consider of it, de-

termined the commitment of the commissioners to be justifiable. *Ex parte Lingood*, 1 Atk. 242. And see further the author's note to the case of *ex parte James*, 3 Deac. 524.

⁵ *Ex parte Perrin*, Buck. 510.

⁶ *Clarke v. Capron*, 2 Ves. 666.

⁷ *Bailey v. Vincent*, 5 Mad. 48.

⁸ *Kirkpatrick v. Dennett*, 1 G. & J. 300.

and said that the only remedy was by bill.¹ In a more recent case, however, where the bankrupt had acquiesced in the commission, Lord Lyndhurst, upon such a petition, restrained the bankrupt from proceeding at law.² And an injunction also will be granted, on petition, to restrain assignees from proceeding in an action, where they have not an equitable as well as a legal right.³

The lord chancellor had no jurisdiction to interfere in a proceeding before a judge of *oyer and terminer*. He could not, therefore, upon a petition in bankruptcy, order the solicitor to the commission to pay costs for not attending to give evidence on the trial of an indictment against the bankrupt, by reason of which the bankrupt was acquitted; the remedy being by indictment or information against the solicitor for such neglect of duty.⁴

Neither had any other court power to review a final order made by the lord chancellor in any matter of bankruptcy. The court of Queen's Bench therefore, had no authority to direct a *prohibition* to the chancellor sitting in bankruptcy.⁵ In one case, indeed, before Lord Redesdale, he would not even permit costs awarded in bankruptcy to be made the subject of an action at law;⁶ but there is some doubt as to the correctness of this decision.⁷

The lord chancellor had no jurisdiction, upon a *petition in bankruptcy*, to appoint a *receiver* of any part of the bankrupt's property; for, except in the case of idiots and lunatics, he has no such power, unless a cause is depending. If any person, therefore, claims an interest in the bankrupt's property, and wishes to have a receiver appointed, the proper mode is to file a short bill for that purpose.⁸ Neither had the chancellor any jurisdiction in bankruptcy to order an *infant heir* of a deceased assignee, to convey (as an infant trustee) the estates vested in him by the decease of his ancestor; for the petition in such a case ought to have been to the chancellor generally, under the statute 7 Ann. c. 19, and not to him as sitting in bankruptcy.⁹ Neither was there any jurisdiction in bankruptcy to direct that the personal

¹ Ex parte *Glossop*, 2 G. & J. 268.

² Ex parte *Leigh*, 2 G. & J. 332. And see Ex parte *Davy*, 1 M. & A. 290. 4 D. & C. 332.

³ Ex parte *Booth*, 4 D. & C. 211.

⁴ Ex parte *Holliday*, 1 Atk. 239.

⁵ Ex parte *Conan*, 3 B. & A. 123.

⁶ In re *Dillon*, 1 Sch. & Lef. 110.

⁷ Per Lord Ellenborough, 2 M. & S. 439.

⁸ Ex parte *Tupper*, 1 Rose, 179. Ex parte *Whitfield*, 2 Atk. 315.

⁹ Ex parte *Beddam*, 1 Rose, 310. Ex parte *Kirk*, Buck. 478.

representative of a deceased assignee should account for the personal estate of the bankrupt in his hands, even though he should admit assets.¹ So, the court of review has no jurisdiction, under a fiat against a bankrupt executor, to order a fund in court to be distributed amongst the creditors of the testator to whose estate the fund belonged; the proper proceeding being by bill in equity for the distribution of assets.²

The lord chancellor however had jurisdiction, upon a summary application in bankruptcy, to order the assignees to pay the messenger his bill of fees and expenses under the commission; and this notwithstanding, even after a final dividend.³ So, with respect to the *solicitor's bill* of fees up to the choice of assignees, the chancellor had in that case also authority, upon petition, to make an order upon the petitioning creditor for the payment of it;⁴ but not in this case, if there were no assets.⁵ But the court of review has no jurisdiction to order the executor of a deceased solicitor to pay the costs of taxing the solicitor's bill, nor to order the executor to refund the balance found due from the deceased solicitor, if the executor does not admit assets.⁶

When any *stock* is standing in the bankrupt's name as *trustee*, the lord chancellor had, by the 77th section of the 6 Geo. 4, c. 16, power to order the assignees, or any other person, whose consent was necessary, to transfer such stock to such person as the chancellor should think fit.

The jurisdiction of the lord chancellor in bankruptcy was not determined by the *superseding* of the commission, as to any act *previously done* under it; for whatever had been done in the bankruptcy might be undone by petition. Therefore a petition would lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit, even after the commission was superseded;⁷ or, a petition by the messenger to order the petitioning creditor to pay him his costs before the choice of assignees.⁸ So, the lord chancellor might order the messenger, who had possessed himself of property of the bankrupt under a superseded commission, to account for the same to the assignees under a subsequent subsisting commission.⁹ He might

¹ Ex parte *Crowe*, Mont. & M. 281.

² Ex parte *Williams*, 3 Dea. 378.

³ Ex parte *Hartopp*, 1 Rose, 450.

⁴ 1 Rose, 450.

⁵ Buck. 475.

⁶ Ex parte *Spackman*, 3 M. & A. 135.

⁷ Ex parte *Fector*, Buck. 428.

⁸ Ex parte *Johnson*, 1 G. & J. 23.

⁹ Ex parte *Shaw*, 2 G. & J. 73.

also at any time order the production and deposit of the proceedings, which were taken under the commission before it was superseded.¹ The greatest injustice, indeed, would have resulted from holding, that the jurisdiction of the lord chancellor was confined to the period during which the commission subsisted; for then, a person against whom a commission was found not to be sustainable, and whose whole property might have been taken from him by colour of it, must either have brought an action at law, in which he might have lost half the value for want of proof, or have gone through the slow process of a bill in equity for discovery and relief. A petition in bankruptcy is *festinum remedium*, and contributes not less to the saving of expense, than to the saving of time. But, as the proceeding under the commission operated by way of sudden seizure of property belonging, or supposed to belong, to a bankrupt, a process so speedy and summary required to be controlled by a speedy and summary course of relief.²

Where, however, a petition by an assignee, under a second commission, prayed that the petitioning creditor under a prior commission (which was abandoned), who had received a sum of money from the bankrupt, on condition of not proceeding with such commission, might refund the money so received; the vice-chancellor decided that the court had not jurisdiction.³

In fine, the lord chancellor possessing, as he did, full and perfect power to make any order whatever which he thought necessary and expedient for the better distribution of the bankrupt's effects, all parties concerned in the working the commission, who had either already availed themselves of any benefit resulting from it, or who had come in under it in any way by *proof*, *petition*, or *otherwise*, with an intention to avail themselves of any benefit expected from it, were bound, as any party in a cause would be, to submit to any such order.

The above observations, as well as those in the following section, which apply to the jurisdiction possessed by the lord

¹ Ex parte *Bernal*, 11 Ves. 558.
Ex parte *Warren*, 1 Rose, 276.
19 Ves. 162.

² Ex parte *Cowan*, 3 B. & A. 123.

³ Ex parte *Marshall*, 2 G. & J. 53. Whether the chancellor had such a jurisdiction, or whether he had only jurisdiction to declare the debt to be forfeited, leaving the

assignees to their action at law to compel the creditor to refund, is a point which does not seem to have been satisfactorily settled, there having been two contrary decisions on the subject; Ex parte *Dimmock*, 2 G. & J. 261; Ex parte *Marshall*, *ib.* 265. The 8th section of the 6 G. 4. c. 16, however, seems to be in favour of the jurisdiction.

chancellor before the Bankruptcy Court Act, apply now, of course, to the court of review, which is declared by that act to have superintendence and control in all matters of bankruptcy, and also to have the same jurisdiction in all such matters as were brought by petition, or otherwise, before the lord chancellor.¹

SECTION IV.

Of the Jurisdiction over those who are Strangers to the Fiat.

It is not very easy to reconcile some of the decisions under this head; but it is apprehended that all difficulties, as to the jurisdiction in bankruptcy over strangers to the fiat, may be removed, by attending to a plain line of distinction that was very clearly drawn by Lord Eldon in expressing himself upon this subject. If a person *claims nothing under the fiat*, then he cannot be brought by the assignees before the court of review on a petition in bankruptcy, notwithstanding the assignees may allege, that he has money belonging to the bankrupt in his hands, or that he claims under a fraudulent conveyance; the proper course being in such a case to bring an action, or file a bill,² for the recovery of it. If, on the contrary, he *comes in of his own accord* to avail himself of the jurisdiction in any matter relating to the bankruptcy, he must then submit to it in all respects, and the court will enforce its order against him.³ And though there may be a difficulty as to the jurisdiction, when a creditor, who is a stranger to the fiat, merely applies to have the fiat, or the certificate, removed out of the way of his proceeding at law against the bankrupt; yet, when the creditor goes further, and prays an inquiry into circumstances impeaching the validity of the fiat, with a view to annul it,—or, in case the fiat should not be annulled or superseded, that there may be a new choice of assignees, and that he may be admitted to prove,—it is then clear that he brings himself within the jurisdiction.⁴ Whenever a party, also, though a stranger to the fiat, applies for and *obtains any order* in bankruptcy, he brings himself within the jurisdiction.⁵ And it seems to follow, that when he only

¹ 1 & 2 W. 4, c. 56, s. 2.⁴ Ex parte Wardenburgh, 1 Rose,² Ex parte Bacon, 2 Molloy, 206.

441.

⁵ Ex parte Bozannet, 1 Rose,³ Ex parte Pease, 1 Rose, 242. 181. Ex parte Pease, ibid. 242.

19 Ves. 25. Ex parte Hall, 1 Rose, 19 Ves. 25.

13.

petitions for any relief relating to the proceedings under the bankruptcy, he, by the very circumstance of petitioning, submits himself to the jurisdiction. But the mere filing an affidavit is not a waiver of any objection to the jurisdiction.¹

It has been determined, however, that where the messenger under a commission took possession of goods, as the property of the bankrupt, the chancellor had, generally speaking, no jurisdiction to order the goods to be delivered up to a party, *merely claiming* them as his own, without first directing an issue to try that fact.² Though in a clear case of property, or a very flagrant case of seizure, there is no doubt that the chancellor had jurisdiction to order such restitution by the messenger, or the assignees; for, the authority which was vested in him by the statute to take order for the disposition of the bankrupt's effects, giving him general jurisdiction over the assignees, it does not seem that he would have overstepped that authority, when he ordered them to restore property, which they were clearly not entitled to retain. And it was upon this principle, that he invariably ordered *short bills*³ to be delivered up to the owner of them, in the case of a banker's bankruptcy, after they had been seized by the messenger as the property of the bankrupt.⁴ So, where a party, whose property was wrongfully seized under a commission, established his interest on the trial of an issue at law, the lord chancellor had then power, not only to order restitution of the property, or its value, but also to order the assignees to compensate the party for the damages which he had sustained by the seizure of the property, or by the subsequent mismanagement of it by the assignees.⁵ And in one case, Lord Eldon, upon the petition of a creditor, to whom the bankrupt had before his bankruptcy given an order on his debtor for the payment of a certain sum, made an order on the debtor to pay such sum over to the creditor notwithstanding the assignees opposed the petition.⁶

Where, however, the bankrupt had delivered bills to third persons for a valuable consideration, without indorsing them, it was decided, that the chancellor had not jurisdiction to

¹ *Ex parte Read*, 1 Deac. & C. 250.

² *Ex parte Craggs*, 1 Rose, 25.

³ See *post*. Ch. 11. Prat. 2, s. 5.

⁴ *Ex parte Rowton*, 1 Rose, 15.
Ex parte Pease, *ibid.* 232.

parte Buchanan, *ibid.* 280. 19 Ves. 201. *Ex parte Burton Bank*,

2 Rose, 162, &c.

⁵ *Ex parte Cowan*, 3 B. & A. 126.

⁶ *Ex parte South*, 3 Swanst. 392.

order the bankrupt, or his assignees, to indorse the bills to such third persons,—on the ground that such persons, being perfect *strangers* to the commission, were not bound to submit to the order of the chancellor in this respect.¹ And where the acceptors of a bill, which had been discounted by the drawer with the bankrupt, joined the drawer in a petition, that, upon payment of the balance due on the bill, the assignees might be restrained from proceeding in any action on it, Lord Eldon dismissed the petition, as it appeared that the acceptors were perfect *strangers* to the commission.² But upon a similar application, where the acceptor had accepted the bill for the *accommodation of the drawer*, Lord Eldon decided that he had jurisdiction to entertain the application, and that the relief which the drawer was entitled to, was not to be defeated by his joining the acceptor in the application.³ This last case is certainly more consistent with *ex parte Rowton*, and the cases of short bills; though at the same time it may be observed, there is *some* distinction between those cases and *ex parte Hall*. For in *ex parte Rowton*, the bills, having been seized by the messenger with the other effects of the bankrupt, were consequently more immediately under the control of the lord chancellor; while in *ex parte Hall*, the bills being in the hands of third persons, they might have been considered as effects not tangible under the commission, and over which the chancellor had no direct control.

When a creditor, however, has *proved* under the fiat, it has been held to give the court a jurisdiction different from that which it is authorised to exercise, where there has been no proof; and that in such a case, where the assignees would have a lien on the dividends, if a claim be determined in their favour, they must in general proceed by *petition* against the creditor for the recovery of any sums, for which he has given credit on account.⁴ But it has been since decided, that the mere circumstance of a creditor coming in under the fiat to *prove* or *claim* a debt, only gives the court jurisdiction

¹ *Ex parte Hall*, 1 Rose, 13; and see *ex parte Stewart*, 1 G. & J. 344; but see *contra ex parte Greening*, 13 Ves. 206. *Ex parte Mosbray*, 1 J. & W. 428.

² *Ex parte Burton*, 1 Rose, 320. This case is given in some of the books (1 Mont. 266), as deciding a point of *set-off*. The reasons for the lord chancellor's judgment do not appear in the

report of the case; but it seems clear, that it proceeded on the ground of want of jurisdiction; and the only wonder is, that so plain a right of *set-off* could ever have been disputed.

³ *Ex parte Higgins*, 2 G. & J. 93.

⁴ *Ex parte Hilton*, 1 Jac. & W. 467. *Ex parte Timbrel*, Buck. 505.

as to the *proof* or *claim*, and not over any property in his possession, of which he claims the legal ownership; and therefore an order was refused against a party, who had merely made a claim under the fiat, to deliver up property to the assignees, which they alleged had been given to him by the bankrupt as a fraudulent performance.¹ Where the commissioners, in balancing the accounts between the bankrupt and a creditor, had found a balance due from the bankrupt to the creditor, the assignees were, on *petition*, restrained from proceeding, in an action at law against the creditor, for a balance which they claimed as due to them.²

In one case Lord Eldon refused, on *petition*, to set aside a purchase of the bankrupt's estate, against a party who was a stranger to the commission,—on the ground that his conduct was not controllable under the commission, and that such a proceeding ought to be by *bill*.³ And for the same reason Lord Manners refused, on *petition*, to set aside the sale of mortgaged premises for want of title, even on the application of the purchaser.⁴ But in a subsequent case before Sir J. Leach, a purchaser of the bankrupt's mortgaged estate, (sold before the commissioners under the general order), who appeared to have been a stranger to the commission, was, upon *petition*, ordered to complete his purchase, notwithstanding he did not even appear upon the hearing of the *petition*.⁵ And in a later case also, it was determined, both by the court of review and the lords commissioners, that the court of review had jurisdiction, upon the sale of the bankrupt's mortgaged property under the general order, to enforce a specific performance of the contract by the purchaser.⁶ But in a subsequent case it has been decided that the court of review had no such jurisdiction.⁷ And it has also been held, that the court cannot order a purchase to be set aside, after it has been completed by a stranger to the fiat.⁸

The lord chancellor had power, however, by the 6 Geo. 4, c. 16, s. 78, to order the bankrupt to join in any conveyance of

¹ Ex parte *Dobson*, 4 D. & C. 69. And see ex parte *Brand*, 1 Dea. 308.

² Ex parte *Mennett*, 1 Rose, 395.

³ Ex parte *Bennett*, 10 Ves. 382.

⁴ Ex parte *Sloane*, 2 Molloy, 452.

⁵ Ex parte *Gould*, 1 G. & J. 231.

⁶ Ex parte *Barrington*, 4 D. & C. 461, confirming ex parte *Sidabotham*, 3 D. & C. 818; and 4 D. & C. 693.

⁷ Ex parte *Cutts*, 3 Dea. 242.

⁸ Ex parte *Holder*, 1 M. & A. 518.

his estate to a purchaser under the commission, either upon the petition of such purchaser, or of the assignees.¹

There is no jurisdiction in bankruptcy to compel a second mortgagee, not claiming under the fiat, but resting upon his security, to join in a sale obtained by a prior mortgagee, (under the general order of the 8th May, 1794), where the sale did not produce enough for both mortgages.² And upon the same principle it was holden that the chancellor had not (under the 6 Geo. 4, c. 16, s. 108) jurisdiction against an execution creditor, who rested on his execution, and did not come in under the commission.³

Neither has the court of review jurisdiction to settle the priority of one mortgagee over others, who are not before the court; though if any two claimants of the bankrupt's property submit to the jurisdiction, the court will then determine which has the priority.⁴

When a petitioner, however, though a stranger to the commission, made out a case of *waste* against the assignees, and prayed an order in the nature of an *injunction* to restrain waste, it was held that the lord chancellor had jurisdiction in bankruptcy to make such order; and that, although it was difficult to find upon what principle the court first granted *injunctions* upon petition in bankruptcy, yet the practice having been established, there was every reason to favour it, as it afforded a speedy remedy in cases of an urgent nature. But, as between the lessor and the assignees of a bankrupt lessee, it has been determined that the court had no jurisdiction, except in cases under the statute.⁵ Therefore, where the lessor of a bankrupt lessee petitioned, that the assignees might be ordered to pay rent due after the bankruptcy, and for a compensation for hay, straw, &c. sold and carried off the premises by the assignees,—the petition was dismissed, on the ground that the court had no jurisdiction in such a case, unless the petition made out a case for an *injunction*.⁶

As the jurisdiction in bankruptcy extends over the *accounts of a partnership*, upon a separate fiat against an individual partner,—so, as a fair consequence of that practice, the court has also jurisdiction, upon the petition of the solvent partner, to order the bankrupt partner to pay to

¹ It seems that he had not previously any jurisdiction to make such an order. *Ex parte Stewart*, 1 G. & J. 344.

² *Ex parte Jackson*, 5 Ves. 357.

³ *Ex parte Botcherley*, 2 G. & J. 357.

⁴ *Ex parte Bignold*, 1 Dea. 515. 3 M. & A. 706.

⁵ 6 G. 4, c. 16, s. 75.

⁶ *Ex parte Warwick*, Buck. 326.

him his share of the surplus of the joint effects received by the bankrupt, after paying 20s. in the pound.¹

In the case of a *contempt* committed by any one against the authority of the lord chancellor in bankruptcy, whether by a stranger, or a party to the commission, the chancellor had in this case equal jurisdiction to punish the offender. Any obstruction of the messenger in the execution of his warrant from the commissioners, though without any previous order made by the chancellor in the matter, amounted to such a contempt; and a person, giving a bond of indemnity against the consequences of such obstruction, was himself involved in the contempt.² So, wherever a fraud upon the great seal was practised in issuing a commission, all persons implicated in the fraud might be brought before the court by *petition*, notwithstanding such persons in other respects might be perfect strangers to the commission.³

To conclude this chapter on the subject of jurisdiction, we may refer the reader to a somewhat amusing case as to the privileges of the bar, where it was decided that the lord chancellor had no jurisdiction in bankruptcy to interfere with the practice of a barrister, as to a retainer.⁴

¹ Ex parte *Lanfear*, 1 Rose, 442.

³ Ex parte *Boyle*, Buck. 247.

² Ex parte *Page*, 1 Rose, 1. Ex parte *Titner*, 1 Atk. 136. Ex parte *Dixon*, 8 Ves. 104.

⁴ Ex parte *Lloyd*, Mont. 70 (note). Ex parte *Elsee*, id. 69.

CHAPTER II.

OF THE TRADING.

- SECT. 1. *What Persons are liable to Bankruptcy.*
2. *What is a sufficient Trading.*
 3. *What is not a sufficient Trading.*
 4. *The Place where the Trade must be carried on.*

SECTION I.

What Persons are liable to Bankruptcy.

1. ALL persons whatever, who are capable in law of making binding contracts, whatever their rank in society may be, are liable to become bankrupt, if they engage in trade. Thus, even a *peer*,¹ who traded in wines, has been made a bankrupt; and a *member of the House of Commons*² also, incurs by trading the same liability. *Clergymen*, likewise; (though prohibited from trading by the 21 H. 8, c. 13, s. 5,) it was held might become bankrupts—on the principle, that the breach of one law by an individual does not prevent his liability to another.³ But, by the 57 G. 3, c. 99, s. 3, a clergyman is now not only prohibited from trading, but every *contract* made by him in any trade is declared to be absolutely *void*. It follows therefore, that, as the petitioning creditor's debt (to ground a fiat upon it) must be contracted *whilst the party is in trade*, a clergyman can now only be made a bankrupt, in respect of a debt contracted by him *before he entered into holy orders*. But any *public officer*, though not in that capacity an object of the bankrupt law, makes himself subject to it by embarking in trade.⁴

¹ In the case of an Earl of Suffolk, mentioned by Lord Hardwicke,

² 1 Atk. 201.

³ *Ibid.*

⁴ *Ex parte Meymot*, 1 Atk. 196. *Hankey v. Jones*, Cowp. 745.

⁵ *Higmore v. Molloy*, 1 Atk. 266.

An *infant*, though he may contract for his own benefit, and though his debts are only voidable by him at his own election, is not liable to bankruptcy; for an infant can *owe* nothing, strictly speaking, except for necessities; and no man can be made a bankrupt for debts which he is not obliged to pay.¹ A commission against an infant, therefore, has been held absolutely void at law.² And even if he is a partner with a person of mature age, a joint fiat will be superseded, that is issued against him and his partner;³ though, if he holds himself out to the world as an adult, and *sui juris*, he cannot in that case apply *himself* to supersede a fiat.⁴

A *married woman* cannot, for the same reason, be a bankrupt; unless, indeed, she is the *wife or daughter of a freeman of London*, and is a separate trader there according to the custom,⁵—in which case she may be the object of a fiat, with respect to her separate effects in trade. And a married woman cannot be made a bankrupt, by reason of having traded before marriage as a *feme sole*; for her creditors, upon her marriage, become the creditors of the husband.⁶ But the wife of a convict sentenced to transportation, is liable to

¹ *Rex v. Cole*, 1 Ld. Raym. 443. *Ex parte Sydebotham*, 1 Atk. 146. Bull. N. P. 38. *Ex parte Moule*, 14 Ves. 603; and see 1 V. & B. 494.

² *O'Brien v. Currie*, 3 C. & P. 283. *Belton v. Hodges*, 9 Bing. 365. 2 Moore & S. 496.

³ *Ex parte Barwis*, 6 Ves. 601.

⁴ *Ex parte Watson*, 16 Ves. 265. *Ex parte Heck*, cit. *ibid*.

⁵ *Ex parte Carington*, 1 Atk. 206. *Davie v. Phillips*, 3 Burr. 1776. 1 Bl. 570.

⁶ *Ex parte Mear*, 2 Bro. 266. Mr. Cooke in his *Bankrupt Laws* (vol. i. p. 27, 5th edit.) seems to think, that any married woman who is *separated* by agreement from her husband, and carrying on trade on her own account, is liable to be made a bankrupt; and he cites a case before Lord Chancellor Apsley, where it was so held; but this appears to be the only case that warrants such a position. The principle on which this doctrine rests, as contended for by him, is, that if a married woman is liable to be sued to execution for the debts she

has contracted during coverture, —as a commission of bankrupt is considered in law as a statute execution,—there is no reason why she should not likewise be subject to this statute execution. And, to establish this point, he gives at full length the case of *Ringstead v. Lady Lanesborough*, (1 C. B. L. 28), and several other cases. But all these cases seem to be overruled by those of *Beard v. Webb*, 2 Bos. & P. 93, and *Marshall v. Rutton*, 8 T. R. 545, in which it was decided, that a *feme covert*, though having a separate maintenance, and living apart from her husband, could not be sued at law for debts contracted during the separation. The result appears to be, that a married woman can only be made bankrupt, where she can be sued and taken in execution for her debts; and this can only be according to the custom of London, or where, perhaps, her husband has abjured the realm, become an exile, or been transported; in which cases he is considered as *civiliter mortuus*, and the woman a widow.

be made a bankrupt, if she becomes a trader, although her husband remains in this country.¹

A *lunatic*, it has been decided in one case,² whilst under the influence of that dreadful malady, was incapable of committing an act of bankruptcy: but it has been since held, that, as lunacy was no defence to an action, so neither was it against a commission of bankruptcy.³

A *person attainted*,—as he is liable (notwithstanding the attain) to be sued in a civil action,—it seems, may also be subject to a fiat in bankruptcy.⁴

SECTION II.

What is a sufficient Trading.

As the *second* section of the 6 G. 4, c. 16, enumerates what persons exercising certain specific trades and occupations shall be deemed traders liable to become bankrupt, it may be as well to take them in the same order as they are mentioned in that statute. They are as follows:

Bankers,—who were first made liable to bankruptcy by the 5 G. 2, c. 30, s. 30. A person *acting* as a banker will be held to be one, though he does not keep an open banking-house.⁵ And holding shares in a joint-stock banking company, and receiving successively two years' dividends on the shares, constitutes a trading as a banker;⁶ but not where the party had no *bona fide* intention of following the business for profit, and no dividends or profits were received by him.⁷ Neither can a person, acting only as an *army agent*, be considered a banker.⁸

Brokers.—These were also included in the 5 G. 2, c. 30. A *pawnbroker*,⁹ a *ship-broker*,¹⁰ and an *insurance-*

¹ *Ex parte Franks*, 7 Bing. 762.
⁶ *Moore & P. 1.*

² *Ex parte Pridley*, 1 C. B. L. 37.

³ *Anon.* 3 Ves. 590, and see Mr. J. Blackstone's remarks, in his Commentaries, upon the received maxim, that a man shall not be permitted to stultify himself. *Quere, tamen*, Whether a lunatic can contract a valid petitioning creditor's debt.

⁴ *Ramsay v. Macdonald*, Foster, 61. *Ex parte Bullock*, 14 Ves. 464.

And see *Ex parte Addison*, 3 Dea. 54.

⁵ *Ex parte Wilson*, 1 Atk. 218.

⁶ *Ex parte Wyndam*, 1 M. D. & D. 146.

⁷ *Ex parte Brundrett*, 2 Dea. 219. *Ex parte Atkinson*, 1 M. D. & D. 300.

⁸ 1 Mont. 12.

⁹ *Highmore v. Molloy*, 1 Atk. 206. *Rawlinson v. Pearson*, 5 B. & A. 124. *Ex parte Stevens*,

⁴ Mad. 256.

¹⁰ *Pott v. Turner*, 6 Bing. 702.

broker,¹ have been held to come within this description; for the general word *broker* is the genus, and all other kinds of brokerage the species. And there seems no reason why a *stock-broker*,² or a *bill-broker*, or a *money-broker*, should not be included in it also. But where a party, ostensibly carrying on the business of a *proctor*, was made a bankrupt as a *bill-broker*, and the only evidence to prove the trading was, "that he procured bills to be discounted, and that on one occasion he was employed to get a bill for 48*l.* discounted," it was held that this was insufficient evidence of the trading,—without specifying the name of any party to whom he had applied to discount any bill, or with whose money any bill was cashed.³ Nor will a mere dealing in accommodation *bills* constitute a trading as a *bill-broker*, where there is no proof that the party had a counting-house or capital for carrying on the alleged business, and no particulars are given of any one bill alleged to have been discounted.⁴ But, where an attorney was in the habit of having the money of his clients deposited with him to lay out for them upon mortgage, and received from others a compensation or gratuity for procuring loans of money for them, besides his charges for preparing the mortgage securities, he was held to be a trader, as a *money-broker*, whether, or not, he might be considered as a banker or a scrivener.⁵

Scriveners,—who were first made liable by the 1 Jac. 1, c. 19, s. 2. These are described by the 6 Geo. 4, c. 16, as "persons receiving other men's monies or estates into their trust or custody." As the trade or calling of a scrivener, *eo nomine*, appears to be extinct,⁶ it is somewhat remarkable that the legislature should have recognized it as an existing trade; but having retained the generic term, it remains to inquire who are the persons that can be classed within it. A scrivener seems to have been employed formerly as a depositary of money, upon trust to place it out on the best security he could for the account of the owner,⁷ and as an agent also in the negotiation of loans, and other pecuniary transactions, being remunerated by a commission from those who employed him. This species of traffic has fallen now into the hands of bankers, annuity-dealers, and attornies; and as the last per-

¹ Id. 708.

² Sed vide *Colt v. Nettervill*, 2 P. Wms. 308.

³ Ex parte *Harvey*, 1 Dea. 571.

⁴ Ex parte *Phipps*, 2 Dea. 487.

⁵ Ex parte *Gem*, 2 M. D. & D.

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⁶ Per Gibbs, C. J. 3 Camp. 539. The *last* genuine scrivener is said to have been a person of the name of Jack Ellis, a contemporary of Dr. Johnson, who is mentioned by him with great respect. *Ibid.*, and see Boswell's Life, vol. iii. p. 20.

⁷ Ex parte *Bath*, Mont. 82.

sons cannot be made bankrupt in the character of *attornies*, it may be useful to consider when they can, in the eye of the law, be looked upon as *scriveners*. When an *attorney* is the general depositary of the money of his clients and other persons, who employ him, not simply in his character of an attorney, but as a money agent, to invest their money upon securities at his own discretion, allowing him procuration fees for any sum placed out by him on bond or mortgage, as well as a fee or charge for the preparing of the deeds, such a course of dealing seems to be substantially the business of a scrivener.¹ But, if an attorney receives money as a mere channel to convey it from a lender to a borrower, or from one client to another, deriving his principal profit from drawing the securities, and from the business of an attorney and a conveyancer, in which such transactions may immediately engage him,—then he cannot with propriety be considered a scrivener.² Nor does a practising attorney, acting in the common and ordinary business of his profession, though he negotiates occasional loans of money, for which he even receives procuration fees, thereby become a scrivener;³ for this is only having incidentally, on particular occasions, the money of his clients to lay out for them.⁴ The distinction to be drawn in every case is, whether the business transacted was incidental to the character of an attorney, or distinct from it; for it is not merely handling other men's money, which makes a man a scrivener,—but he must get that money into his hands in a course of *trading*, whether that trading be for his own benefit only, or for that of other men also, as in the case of a factor. If the attorney, however, takes procuration money for loans, as well as his fees as an attorney, acting in the former instance to such an extent as to afford evidence of his intention always to do so, Lord Eldon decided that he might then be the object of a commission as a scrivener. But, though the same person may unite both the employments of an attorney and a scrivener, it must be ascertained in which transaction he was the one or the other; and it is very doubtful whether the policy of the law would permit him to be *both* in the same transaction.⁵ If a client, indeed, deposit a sum of money with an attorney, until the attorney can find a borrower, *pro hac vice* the attorney will be a money-scrivener; and a *course of dealing* of that description will render

¹ *Hutchinson v. Gascoigne*, 1 Holt. 507.

² *Ibid.*

³ *Ex parte Warren*, 2 Sch. & Lef. 414.

⁴ *Adams v. Malkin*, 3 Camp. 534. Per Gibbs, C. J.; and see *Ex parte Paterson*, 1 Rose, 402.

⁵ *Ex parte Malkin*, 2 V. & B. 31, per Ld. E.

him liable to the bankrupt law; though one or two instances merely would not have this effect.¹ Notwithstanding, therefore, an attorney may unite occasionally the employment of a scrivener, by negotiating annuities and loans, yet when the attorney is the predominant character in these transactions,—that is, where the bonds, judgments, and warrants of attorney, by which the annuities are secured to the grantee, are prepared in his office, and he charges for them in his bill as an *attorney*, though the annuity commission be included in these charges,—he will not be subject to the bankrupt law as a scrivener.² For it is not enough to show that he has negotiated loans and charged negotiation money; it must distinctly appear that he has been *entrusted* with other men's monies, in the language of the statute.³ It has been decided, also, that a *clerk in the custom-house*, who was employed by merchants to receive money on debentures, with which he discounted bills on his own account, was not a scrivener within the meaning of the bankrupt law.⁴

Persons insuring ships, or their freights, or other matters, against perils of the sea. This description of persons, (in common parlance called *underwriters*,) could not, before the 6 Geo. 4, c. 16, in that character, be made bankrupt.⁵

Warehousemen, wharfingers, packers.

Builders. These were not considered traders within the former bankrupt laws.⁶ A party who bought six carcasses of houses, for the purpose of finishing them, and selling them again when he had made them habitable, and who ordered materials for this purpose, representing himself to be a builder, was held to be a trader, within the above enactment.⁷ But where two attorneys in partnership lent money on mortgage to a party engaged in a building speculation, and, the mortgage being forfeited, they took possession of the carcasses of the houses, and finished them at their own expense, for the purpose of selling or letting them, and they also purchased a few other carcasses, though not in their character of mort-

¹ Per Gibbs, C. J., 3 Camp. 534; and see *Ex parte Wilson*, 1 Atk. 218; *Ex parte Burchall*, *Ibid.* 141. *Bird v. Mayor*, *Ld. Raym.* 851, and *Holt*, N. P. Rep. 510; where the reporter has in a note of much research thrown great light upon the ancient vocation of a scrivener, in which most of the cases on the subject are collected.

² *Hurd v. Brydges*, *Holt*. 654.

³ *Lott v. Melville*, 3 Scott, N. R. 346.

⁴ *Hanson v. Harrison*, 2 Esp. 555. But *quære*, whether he would not now be held to be within the words of the new statute, viz. as "receiving other men's monies or estates into his trust or custody."

⁵ *Ex parte Bell*, 15 Ves. 355.

⁶ *Clark v. Wisdom*, 5 Esp. 147. *Williams v. Stevens*, 2 Camp. 300.

⁷ *Ex parte Neirincks*, 1 Dea. 78.

gagees, which they employed a builder to finish for the same purpose, it was held that this was not a joint trading as *builders*, within the meaning of the bankrupt laws.¹

Carpenters, shipwrights. It was doubtful, whether a carpenter could formerly be made bankrupt, the judges having upon one occasion differed on the point;² though Lord Holt decided that a ship-carpenter was within the former statutes.³

Victuallers, keepers of inns, taverns, hotels,⁴ or coffee-houses. The keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is an hotel-keeper, within the meaning of this section; although the guests take their meals with the mistress of the house,⁵ or the provisions are set apart as the separate property of each guest.⁶ But a lodging-house keeper cannot be made a bankrupt, unless he is proved to have sold provisions to his guests,⁷ although he buys furniture for the purpose of being let with the lodgings.⁸

Dyers, printers, bleachers, fullers, calenderers. A dyer was considered formerly a trader within the bankrupt laws,⁹ though the authority usually referred to was certainly far from decisive on the point: and a bleacher (according to Sir William Evans,¹⁰) had no more right to be designated a trader than a washerwoman.

Cattle or sheep salesmen. This designation will, it is apprehended, include *drovers* (who were specially exempted from bankruptcy by the 5 Geo. 2, c. 30, s. 40); for, as it has been decided that a drover is not merely a person confined to the description in the 5 & 6 Edw. 6, c. 14, s. 16, but one who employs himself generally in buying cattle and selling them again,¹¹ a drover may consequently either be considered as

¹ Ex parte *Educards*, 1 Mont. Dea. & D. 3.

² *Chapman v. Lamphire*, 3 Mod. 155.

³ *Kirney v. Smith*, 1 Ld. Raym. 741.

⁴ Neither victuallers, nor inn-keepers, could formerly be made bankrupts, as long as they confined themselves to supplying their guests in the house; but if their dealings showed a general intention to sell out of doors, however small the quantity actually sold, they were then considered liable. *Crisp v. Pratt*, Cro. Car. 549. *Newton v. Trigg*, 3 Mod. 329. 1 Salk. 109.

Saunderson v. Rowles, 4 Burr. 2067. *Buscall v. Hogg*, 3 Wils. 146. *Patman v. Vaughan*, 1 T. R. 572. Ex parte *Maginnis*, 1 Rose, 84.

⁵ *Gibson v. King*, 10 Mees. & W. 667. 1 Car. & M. 458.

⁶ *Smith v. Scott*, 9 Bing. 14. 2 Moore & S. 35.

⁷ Ex parte *Wilkes*, 2 M. & A. 667. 2 Dea. 1.

⁸ Ex parte *Bowers*, 2 Dea. 99.

⁹ *Squire v. Johns*, Cro. Jac. 585.

¹⁰ Letter to Sir S. Romilly, p. 167.

¹¹ *Bolton v. Sowerby*, 11 East, 278. *Mills v. Hughes*, Willes, 588: and see per Bayley J., 11 East, 279.

to unforeseen losses, by the failure of those persons to whom he is obliged to give credit, and with whose credit his is interwoven.¹ To bring a man within the descriptive words of the statute, as a person "seeking his living by buying and selling," there must, of course, not only be proof of the *animus mercandi*, but of the *animus quærendi victum mercando*.² And the buying and selling, also, should be a buying and selling of the *same commodity*, to constitute a regular trading; for a man, who lives by *buying only*, or *selling only*, cannot be a bankrupt.³ It is immaterial, however, whether the commodity is sold again in the same state, or whether it is converted into any other shape, and has its value improved by the process of manufacture, or by manual labour bestowed upon it. Thus a *merchant*, or *retail shopkeeper*, a *manufacturer* on a large scale, or a *common artizan*, who seek their living by purchasing goods or materials, and selling them again, either in their original or altered state, are all equally traders within the bankrupt law. A person who even deals in a commodity *illegally*, as a *smuggler*,⁴ though he commits an offence against an act of parliament, and is punishable for so doing, is nevertheless considered a trader; for (as in the case of the *clergyman*,⁵ before-mentioned) he is not to avail himself of the breach of one law, in order to avoid being subject to another. So, a person *buying and selling horses* may be a trader, though he has not taken out the licence required by law to deal in horses.⁶

One single act of buying and selling, however, will not make a man a trader within the bankrupt law, unless there is some proof of his intention to continue such a course of dealing;⁷ for he cannot in that case be said to *seek his living*; and therefore some repeated practice of buying and selling, and an endeavour to gain profit by so doing, is generally required to be proved.⁸ For a man may import goods, without selling them, or sell off goods previously bought for his private use, or any special purpose, without being deemed a trader.⁹ But trading in a very small degree will sustain a fiat, if sufficient for the inference of an intention to deal generally; the trading depending not so much upon the *quantity*, as upon the *intention*.¹⁰ Neither is any *profit*

¹ *Port v. Turton*, 2 Wils. 169.

² Ex parte *Paterson*, 1 Rose, 402.

³ Per Ld. M., *Hankey v. Jones*, 484. Cowp. 750.

⁴ Ex parte *Meymott*, 1 Atk. 196. *Cobb v. Symonds*, 5 B. & A. 516.

⁵ Ante, p. 23.

⁶ Ex parte *Gibbs*, 2 Rose, 38.

⁷ Ex parte *Lavender*, 4 D. & C. *

⁸ 2 Bl. Com. 476.

⁹ 3 Keb. 451, 1 Ventr. 29. 70.

¹⁰ Ex parte *Moule*, 14 Ves. 602.

an absolute ingredient to prove a man a trader; for the general presumption in all cases of bankruptcy is, that there is *no profit*,—but either waste, imprudence, misfortune, or ignorant trading. The true criterion is, whether the party means to sell, *with a view to profit*, to any person who applies for the commodity in which he professes to deal. A *surgeon*, therefore, who does not confine the sale of his drugs to his patients, but sells them to any chance customers who apply for them, is a trader within the bankrupt law.¹ And the intention of the party to sell generally to all customers, or as a favour to particular persons, is a question of fact, that must be left in each particular case to a jury to determine.²

The *publisher of a newspaper*, having the whole daily impression from the proprietors, reselling it at a profit, and bearing the loss of such papers as remain unsold, has been considered to be a trader within the bankrupt law,—notwithstanding he is, in fact, a servant of the proprietor of the newspaper.³

Drawing and redrawing bills of exchange,—if there be a continuation of doing so, with a view to gain a profit upon the exchange,—is a trafficking in exchange, and a trading, also, within the bankrupt law.⁴

A *Fisherman*, buying fish of other boats at sea, and selling it on shore, has been likewise deemed a trader; but not, if he merely sells the fish which he catches himself, or even if he buys a few fish, occasionally, to make up a sufficient cargo.⁵

But the *owner of a colliery*, selling coal that he buys at market, together with that from his own mine, has been held to be a trader within the statute,⁶ though it is a question for the jury, as to the *intention* with which he bought the coal.⁷ For if a man buys any article, for the mere purpose of *mixing it* with the produce of his own land, in order to sell the mixture more advantageously, he does not thereby become a trader.⁸ Where *lands or mines*, how-

¹ Ex parte Daubeny, 2 Dea. 72.

² Patman v. Vaughan, 1 T. R. 572. Bartholomew v. Sherwood, Ibid. 573. Gale v. Halfknight, 3 Star. 56.

³ Gillingham v. Laing, 2 Marsh. 236. 6 Taunt. 532.

⁴ Richardson v. Bradshaw, 1 Atk. 128; but see post. In the 5 G. 4, c. 93, the "drawing and redrawing, negotiating or discount-

ing bills of exchange," was made a specific act of trading; but that provision is, for some cause unknown, omitted in the 6 Geo. 4, c. 16.

⁵ Heanney v. Birch, 1 Rose, 356. Ex parte Gallimore, 2 Rose, 428, per Ld. Eldon.

⁶ Port v. Turton, 2 Wils. 169.

⁷ 2 Rose, 424.

⁸ Patten v. Browne, 7 Taunt. 409.

ever, are occupied, not for the purpose merely of selling the produce, or of getting the ore, but for the purpose of carrying on a great *manufacture*, which renders it *necessary* to purchase other produce or ore, in order to mix with the produce or ore of the occupier's lands or mines, this becomes then a trading within the bankrupt law.¹ The question, in all these cases of working up the produce of the soil, is, whether the ore is manufactured, merely as a mode of *enjoying the profits of the land*,—or whether the manufacture of it is carried on substantially and independently as a *trade*.

With respect to persons engaged in *partnership*,—it has been held sufficient proof of trading, that a party acknowledges himself to be in partnership with one who is a trader, and has also given directions in the concern,—although no positive act of buying and selling during the term of the partnership, as to him, may be established in evidence.²

An *executor*, who carries on the trade of his testator, and in the course of such dealing buys and sells entire parcels and quantities of goods, is liable to be made a bankrupt; although he carries on the trade merely for the benefit of his testator's children,³ and though his name does not appear in the business.⁴

If a person *leaves off his trade* for some other employment, his doing so will not exempt him from his liability to be made a bankrupt, unless he discontinues it with the express object of abandoning it, and completely detaching from himself the character of a trader.⁵ And still less will a person be exempted from such liability, who only partially discontinues his trade, or ceases to carry on only a particular portion of it. Thus a *pawnbroker*, who had given over taking in goods on pledge, but continued to sell the unredeemed pledges, was held still to carry on the trade of a pawnbroker, and to be subject to the bankrupt law.⁶ So, a *manufacturer*, who merely ceases to manufacture more goods, does not lose the character of a trader, if he continues to sell those already manufactured.⁷ So, also, where a party was in partnership with another, which had been dissolved some years, and no act of trading had been done for two or three

¹ *Crawshay v. Moule*, 1 Swanst. 495. 1 Wils. 181.

² *Parker v. Barker*, 1 Brod. & Bing. 9.

³ *Viner v. Cadell*, 3 Esp. 88. Ex parte *Garland*, 10 Ves. 110.

⁴ *Hankey v. Turgood*, 1 C. B. L. 67; but see *post*.

⁵ Ex parte *Paterson*, 1 Rose, 402. Ex parte *Cundy*, 2 Rose, 257.

⁶ *Rawlinson v. Pearson*, 5 B. & A. 124.

⁷ *Wharen v. Roulledge*, 5 Esp. 235.

years before the petitioning creditor's debt accrued, but the concern had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of,—the trading in this case was held to be continued.¹ And though a trader retires altogether from business, yet if he owes debts contracted in the course of his trade, and afterwards commits an act of bankruptcy, he is still liable to be made a bankrupt.²

SECTION III.

What is not a sufficient Trading.

In considering what is *not a sufficient* trading within the bankrupt law, we may first notice those persons who are *specially exempted* from bankruptcy by statute.

1. *Farmers*,—who were also excepted by the 5 G. 2, c. 30, s. 40; and the reason of the exemption seems to be, that trade is not their *principal*, but only a *collateral* object; (their chief concern being to manure and till the ground, and make the best advantage of its produce;) and also, that the subjecting them to the law of bankruptcy might be the means of defeating their landlords of the security, which the law has given the latter, above all other creditors, for the payment of their reserved rents.³ But this exception, of course, merely extends to them while they continue to deal *as farmers*; for if they trade in any commodity not incident to the farming business, their character of farmers will not exempt them from a liability to be made bankrupt. Therefore, though a farmer who makes cheese for sale, and buys salt and runnet to mix with the milk of which it is composed, is not thereby a trader,—yet if he *buys up the cheese* from other dairies, and sells it, he in such a case becomes a trader. So, also, if he buys a greater quantity of horses or cattle, or of any other commodity, than can be fairly considered *necessary* or *incidental* to the enjoyment and stocking of his farm, and sells

¹ *Backhouse v. Tarleton*, 2 Star. Evid. 143. The early cases upon the question, whether a trader who had ceased to buy, but was selling off his stock, could be made a bankrupt, are not very satisfactory. (*Cotton v. Dainty*, 1 Vent. 69, 2 Keb. 487, Latw. 411. *Bateman's case*, 1 Vent. 166. *Naylor v. Hall*, Palm. 323.)

The cases cited in the text, however, place the doctrine now upon its proper footing,—the material point for consideration being, whether the trade is *completely abandoned*, or only *partially discontinued*.

² Ex parte *Bamford*, 15 Ves. 449.

³ 2 Bl. Com. 474.

them again for profit.¹ But if he sells his horses or cattle when he has no longer need of them,—or if he purchases provender for his cattle, and, finding he has more than is requisite for their consumption, sells part of it again,—then either of these acts of buying or selling will not render him a trader.² So, where a farmer, who kept hounds, was accustomed to purchase dead horses to feed them, and sell the skins and bones when the carrion was consumed, he was not considered a trader within the bankrupt law,—notwithstanding, on one occasion, he had said that he should make a good thing of it; for the horses were purchased expressly for the dogs, and not with the view of any ulterior profit.³ And where a farmer occasionally (that is, six times in twelve years) bought horses, hay, corn, &c. even with a view to sell again for profit, it was held that he did not thereby necessarily make himself a trader within the bankrupt law; and that it was for a jury to determine, whether he was such a general dealer in horses, or those other articles, as to induce them to consider him as seeking his livelihood by buying and selling. In this last case Mr. J. Chambre observed, that he could not help thinking that in *Bartholomew v. Sherwood*⁴ it was a pretty strong thing there to find the party a trader;⁵ and that any gentleman might make a few occasional bargains, without having recourse to them as the means of seeking his living.⁶ Upon the same principle, where a person in the course of nine years made three different purchases of oil from the Greenland fishery, only one of which he was proved to have sold again,—this was held to be insufficient evidence of seeking his living by buying and selling.⁷ So, if a farmer, from the deficiency or badness of his crops, buy other produce to mix with his own, in order to improve it, or to make up the usual quantity for sale,—this act of buying and selling will not subject him to the bankrupt law; his object being not to become a regular dealer in the article bought and sold, but to make the most of the produce of his farm.⁸

2. *Graziers* are also excepted (as they were by the 5 G. 2, c. 30,) from liability to be made bankrupt; and for the same

¹ *Bartholomew v. Sherwood*, 1 T. R. 573, note (a). *Mayo v. Archer*, 1 Str. 513. Ex parte *Gibbs*, 2 Rose, 38. *Wright v. Bird*, 1 Pri. 20. Ex parte *Newall*, 3 Dea. 333.

² *Bolton v. Sowerby*, 11 East, 274.

³ *Summersett v. Jervis*, 3 B. & B. 2. 6 Moore, 56.

⁴ *Supra*. But see *ante*, p. 26.

⁵ He had bought and sold five or six horses for profit, in the course of two years.

⁶ *Stewart v. Ball*, 2 N. R. 78.

⁷ *Gale v. Halfknight*, 3 Star. 56.

⁸ *Patten v. Broune*, 7 Taunt. 409. Ex parte *Gallimore*, 2 Rose, 427.

reason as applies to farmers. That statute (as has been before observed) also excepted *drovers*; but the same reason of exemption is not applicable to them; a drover being a person who buys cattle at one town or market, and drives them to another for the purpose of speedily selling them;¹ whilst a grazier, though he buys cattle for sale, yet agists them generally some length of time upon his farm, for the purpose of fattening them, and preparing them for the market.

3. *Common labourers or workmen for hire*, are also excepted by the 6 Geo. 4, c. 16, s. 2; for these persons not only do not get their living by buying and selling, but they have also neither capital nor credit; both of which are essential ingredients in the character of a trader.

4. *Receiver-general of the taxes*,—which office was also in the exceptions of the 5 Geo. 2, c. 30; the principle of the exception being, that the King should not be defeated of those extensive remedies, which are put into his hands by the prerogative.²

5. *Member of, or subscriber to, any incorporated commercial or trading companies established by charter or act of parliament*. This exception was provided for before by particular statutes,³ as to members of the Bank of England, and the East India and some other public companies,—but was not, until the 6 Geo. 4, c. 16, an express exception included in the bankrupt law. And although the company is not established by charter or act of parliament, yet the purchase of shares in such company will not necessarily constitute a trading. For where they were held for a period of six days only, and no dividends or profits were received by the party;⁴ or where his object in buying them was merely to be made a bankrupt, and he had no *bonâ fide* intentions of following the business of the company for profit, he was held to be no trader⁵ within the bankrupt law. But if he has such an intention, and receives successively two years' dividends on his shares, he then becomes a trader.⁶

Besides these persons who are thus *specially exempted* from bankruptcy by statute, there are various others, who by different judicial decisions have been held not to come within the Bankrupt Law. For, as a *single* act of buying and selling will not constitute a trading,⁷ when

¹ Willes, 590.

² 2 Bl. Com. 474.

³ Whitm. Bl. 15.

⁴ Ex parte Atkinson, 1 M. D. & D. 300.

⁵ Ex parte Brundrett, 2 Dea. 219.

⁶ Ex parte Wyndham, 1 M. D. & D. 146. Ex parte Brown, 2 M. D. & D. 758.

⁷ Ante, p. 32.

the intent to trade generally is not proved,¹ so neither will *occasional* acts under particular restraints, or for particular purposes. Thus the *colonel of a fencible regiment*, who sells the cast-off horses of his regiment;² a *school-master*, who buys books to sell to his scholars;³ the *owner of a mine*⁴ who buys candles to sell to his workmen; a *contractor for victualling the King's fleet*,⁵ who merely buys provisions for that purpose, and sells off the surplus; or a mere *lodging-house keeper* who does not sell provisions to her lodgers,⁶ is, neither of them, in respect of such several dealing, liable to be made bankrupt.

So, no man who holds a *public office*, and who, in order to fulfil the duties of it, is *obliged* to buy and sell, is a trader within the bankrupt law,—if the buying and selling is strictly confined to the discharge of his official duties.⁷ Thus the *King's butler or steward*,⁸ the *butlers or stewards of the inns of court*, *sutlers of armies*,⁹ *commissioners of the excise*, and *farmers of the customs*,¹⁰ are none of them within the bankrupt law.

No person possessed of or occupying land, either as a freeholder or a termor, and selling the produce of it, whether obtained above or below the surface, is considered a trader within the law of bankruptcy, unless he comes within any of the specific descriptions contained in the above statutes. And it makes no difference whether such produce is got and sold, without undergoing any change,—or whether, after getting or gathering, it is worked up for sale in the usual way with other ingredients, and by various processes. Thus the worker of *lead or iron mines*, or the *cider-grower*, who respectively cause the ore, and the apples, to undergo different processes, before they are converted into the material which is sold, is no more liable to be made bankrupt than the *owner of a coal-mine*¹¹ or of a *stone-quarry*,¹² or the *farmer*, who sell the simple substance and produce of the soil in the same state as it is respectively got and gathered. For all these different processes are only incidental to the necessary sale of the *produce of the soil*, and the usual mode of enjoying it. So, where a party took a

¹ Ex parte Wilkes, 2 M. & A. 667. 2 Dea. 1.

² Ex parte Blackmore, 6 Ves. 3.

³ 3 Mod. 330. *Valentine v. Vaughan*, Peake, 76.

⁴ Ex parte Walker, 1 C. B. L. 55. Ex parte Craddock, *ibid*.

⁵ Per Holt C. J., Comb. 182. 1 Salk. 109.

⁶ Ex parte Wilkes, 2 M. & A. 667. 2 Dea. 1.

⁷ *Gibson v. Thompson*, 3 Keb. 451.

⁸ Skin. 292.

⁹ 3 Keb. 451. C. B. L. 56.

¹⁰ 1 Ventr. 270.

¹¹ *Port v. Turton*, 2 Wils. 169.

¹² Ex parte Gardner, 1 Rose, 377; and see *ante*, p. 33.

lease of certain salt-works and brine-pits, for the purpose of manufacturing and selling salt, which was made chiefly from the springs and rock-salt upon the premises demised, but some of the brine was obtained by channels from adjoining premises, it was held that this was not a trading as a "workmanship of goods and commodities" within the meaning of the 6 G. 4, c. 16, s. 2.¹ The distinction that must not be lost sight of, when any materials are purchased by the party is, whether the materials are bought for the *express purpose* of putting the naked production of the earth into a manufactured and marketable state; or whether such production is an insignificant article, compared with the quantity or value of the materials bought, and of the manufacture itself.² Upon this principle, the *fisherman*, as we have seen³ who does not obtain a sufficient cargo by his own fishing, and buys a few fish merely to complete it, and supply the market, is not held to be a trader;⁴ for, in order to enjoy the produce of his personal labour, he is thus compelled, as it were, to the act of buying occasionally, that he may be able to sell such produce. If, indeed, the materials bought are *beyond what is necessary* to supply the deficiency of his personal labour, it then becomes an act of trading.⁵

As the proprietor or occupier of land cannot be made a bankrupt for acts of buying and selling its produce, so, *à fortiori*, the *buying and selling land itself*, or an interest in land, is not such a buying and selling, as will constitute a trading.⁶

Bank stock and government securities, not being articles of merchandise,—the mere buying and selling them, it has been said, will not be a trading within the bankrupt law;⁷ and this position has been laid down in all the books that have treated upon bankruptcy. It is, however, a mere *obiter dictum* of Lord King, which was applied by him to the case of a *proprietor* of East India stock, and does not seem to be applicable to the case of a *stock-broker*,⁸ receiving a commission for buying and selling stock for other persons.

With respect to persons engaged in the traffic of *drawing and re-drawing bills of exchange*, &c.—it is not every draw-

¹ Ex parte Atkinson, 1 M. D. & D. 300.

² Parker v. Wells, 1 T. R. 34.

³ Paul v. Dowling, 3 Mood. & M. 267.

⁴ Ante, p. 29.

⁵ Ex parte Gallimore, 2 Rose, 428.

⁶ Ibid.

⁷ Port v. Turtton, 2 Wils. 169.

⁸ 2 Bl. Com. 476. Colt v. Netterville, 2 P. Wms. 308.

⁹ See ante, p. 26.

ing and re-drawing that will be considered to be traffic. For if a person having occasion for money to pay a debt on mortgage, or any other security, draws on his banker for it, and as a mode of repayment, permits the banker to draw on him by bills,—such a drawing and re-drawing would not, it seems, be held to constitute a trading.¹

Executor.—An *executor*, who merely disposes of the stock in trade of his testator, does not thereby become a trader, even if he buys some additional goods to render those on hand more saleable. Therefore, where the *executor* of a wine-merchant found it necessary to buy wines to refine the stock left by his testator, his doing so was held not to render him a trader within the bankrupt law. But if he had bought wines, and sold them to the customers *entire*, he would then, as we have already seen, have been liable to be made a bankrupt,² notwithstanding even he was trading for the benefit of his testator's children.³

A buying in connection with others, with a view to carry on a system of fraud, is not trading within the bankrupt law;⁴ but when a party represents himself as a dealer, and offers goods in exchange, it is then a question for the jury to say, if he does not buy to sell again.⁵

SECTION IV.

Of the Place where the Trade must be carried on.

The acts of buying and selling, which jointly constitute the trading, need not *both* take place in England; for if a merchant, whether native, denizen, or alien, buys beyond sea and sells in England, or buys in England and sells beyond sea,—it is a sufficient trading to make him liable to a fiat in bankruptcy, provided he come to this country, and *there* commits an act of bankruptcy. For his trading to England procures him a credit here; and it is quite sufficient, if he is occasionally, and not permanently, resident in this country.⁶

¹ Per Ld. M., *Hankey v. Jones*, Cowp. 751.

² Ex parte Nutt, 1 Atk. 102.

³ *Viner v. Cadell*, 3 Esp. 88. 10 Ves. 110; and see *ante*, p. 34.

⁴ *Millikin v. Brandon*, 1 Carr. 380.

⁵ *Ibid*.

⁶ *Alexander v. Vaughan*, Cowp.

398. Ex parte Smith, cited Cowp. 402. *Hitchcox v. Sedgwick*, 2 Vern. 162. 1 Salk. 110. *Dodsworth v. Anderson*, Sir T. Raym. 375. *Jones*, 141. Ex parte Williamson, 1 Atk. 82. *Inglis v. Grant*, 5 T. R. 530. *Allen v. Cannon*, 4 B. & A. 418. *Williams v. Nunn*, 1 Taunt. 270.

CHAPTER III.

OF THE ACT OF BANKRUPTCY.

SECT. 1. *Of the Nature and Effect of an Act of Bankruptcy, generally.*

2. *Of the several Acts of Bankruptcy specified by Statute.*

SECTION I.

Of the Nature and Effect of an Act of Bankruptcy, generally.

BEFORE we enumerate the various acts of bankruptcy specified by statute, it is proposed to consider the general nature and effect of an act of bankruptcy; which, though treated in many of the former statutes as a criminal act on the part of the bankrupt, has been now long regarded as nothing else than a mere proof or test of a trader's insolvency. And in this light it is viewed by the legislature in the several statutes, which are more adapted to the relief of embarrassment and misfortune, than the punishment of fraud or crime.

As there is sometimes great mischief in the relation back, which the law is in some instances obliged to give to the act of bankruptcy, it is now provided by the 5 & 6 Vict. c. 122, s. 7, that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat against him. The act may be committed either *during trading*, or *after* the trading has ceased, provided there was then an existing debt contracted when in trade.¹ And as the 6 Geo. 4, c. 16, seems to be confined to England, and not to acts done in other parts of the British dominions, or in foreign countries (with the single exception of remaining out of the realm),—the act of

¹ Ex parte *Bamford*, 15 Ves. 449. Ex parte *Lynch*, Mont. 453. Ex parte *Dewdney*, id. 495.

bankruptcy must, therefore, with that exception, be committed in England.¹

It is no objection that the act of bankruptcy is committed between the time of striking the docket, and the issuing of the fiat.² It must be committed, however, *before the fiat is sealed*; though, if the sealing of the fiat, and the committing of the act of bankruptcy, are on the same day, the priority of the act of bankruptcy may be established by evidence.³ And in the case of a partnership, and a joint fiat issued against the firm, *each of the partners* must have committed an act of bankruptcy, in order to support the fiat.⁴

The legislature having also expressly declared, by positive enactment, what shall be considered criterions of insolvency or fraud whereon to ground a fiat in bankruptcy, none other can be admitted by inference or implication.⁵

A peculiar and a very important quality attached to an act of bankruptcy is, that, when once clearly committed, it cannot afterwards be explained away;⁶ even though the trader was perfectly unconscious at the time that he was committing an act of bankruptcy, and when he was so conscious, did immediately every thing in his power to recall it;⁷ or, even though the trader for some time afterwards continues perfectly solvent, and carries on a considerable trade.⁸ But, though a trader may commit a plain act of bankruptcy, yet if he afterwards pays off or compounds with all his then creditors, he in that case becomes a new man, and will not afterwards be affected by it.⁹

An act of bankruptcy may now, by the provisions of the 5 & 6 Vict. c. 122, s. 8, be concerted between the bankrupt and the petitioning creditor, although such concert formerly rendered a commission or fiat invalid, on the presumption that the petitioning creditor was to have some peculiar advantage over the other creditors.

¹ *Simpson v. Sikes*, 6 M. & S. 312.

² *Alexander v. Vaughan*, Cowp. 398. *Norden v. James*, Dick. 533. *Inglis v. Grant*, 5 T. R. 530.

³ *Wydon's case*, 14 Ves. 80. *Ex parte Dufrene*, 1 Rose, 333.

⁴ *Mills v. Bennett*, 2 M. & S. 556. *Ex parte Macor*, 19 Ves. 543.

⁵ 1 Bl. Rep. 442. 3 Camp. 350.

15 Ves. 462. 17 Ves. 198. 2 Bl. Com. 479.

⁶ *Hopkins v. Ellis*, 1 Salk. 110. Holt, 95. *Collett v. Freeman*, 2 T. R. 59. *Wood v. Thwaites*, 3 Esp. 245.

⁷ 2 T. R. 62. *Mucklow v. May*, 1 Taunt, 479.

⁸ *Hassell v. Simpson*, Doug. 89. *Pulling v. Tucker*, 4 B. & A. 382.

⁹ 1 Salk. 110.

SECTION II.

Of the several Acts of Bankruptcy specified by Statute.

The *third* and *five* following clauses of the 6 Geo. 4, c. 16 describe what are to be considered *acts of bankruptcy*,—including not only those under the former statutes, but also specifying some which were doubted, or which were not in reality acts of bankruptcy, under the former law. They are not less than *seventeen* in number, besides *two* others, which are only applicable to *members of parliament*. Those affecting the general trade are as follows :

1. *Departing the realm.*
2. *Being out of the realm, and remaining abroad.*
3. *Departing from his dwelling-house.*
4. *Otherwise absenting himself.*
5. *Beginning to keep his house.*
6. *Suffering himself to be arrested for any debt not due.*
7. *Yielding himself to prison.*
8. *Suffering himself to be outlawed.*
9. *Procuring himself to be arrested.*
10. *Procuring his goods, money, or chattels to be attached, sequestered, or taken in execution.*
11. *Making, or causing to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels.¹*
12. *Making, or causing to be made, any fraudulent surrender of any of his copyhold lands or tenements.*
13. *Making, or causing to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels.*

With intent, in any of these cases, to defeat or delay his creditors.

All the above-mentioned acts of bankruptcy are, therefore, jointly made up of *action and intent*,—being in themselves, considered as *acts alone*, indifferent and equivocal, and deriving their character only from the *intent* that accompanies the act ; but these that follow are in themselves *substantive acts of bankruptcy*, and where the *intent* to delay creditors is wholly immaterial.

14. *Having been arrested, or committed to prison, for debt, or non-payment of money,—and thereupon lying in prison for twenty-one days.²*

¹ See *vide* 6 G. 4, c. 16, sect. 4, the time was two months ; and see and post.

² Sect. 5. By the former law, of this act of bankruptcy.

15. *Escaping out of prison, or custody, after having been so arrested, committed, or detained; the act of bankruptcy in this case to relate back to the time of such arrest, commitment, or detention.*¹

16. *Filing a declaration in the office of the secretary of bankrupts, signed by himself, and attested by an attorney or solicitor, that the party is insolvent, or unable to meet his engagements.*²

17. *After a docket struck, paying money, or giving or delivering any satisfaction or security, for his debt, or any part thereof, to the person striking the docket, whereby such person may receive more in the pound in respect of his debt, than the other creditors.*³

And now to the above may be added:—

18. *Filing a petition to the court for relief of insolvent debtors for his discharge from custody, under the 1 & 2 Vict., c. 110.*

19. *Non-compliance of a trader with the requisitions of the 5 & 6 Vict., c. 122, s. 11, after being summoned to appear before the court of bankruptcy, on the previous affidavit and demand of a creditor according to the provisions of that act.*

20. *Not paying, securing, or compounding for a judgment debt, within 14 days after notice requiring payment.*⁴

21. *Disobeying the order of any court of equity, or order in bankruptcy or lunacy, for payment of money, after service of a peremptory order for the payment.*⁵

22. *Filing a declaration of insolvency in the bankrupt office.*⁶

Having thus enumerated all the acts of bankruptcy affecting the general trader, it is now proposed to consider each of them separately, for the purpose of examining the mode in which they have been severally construed by the various decisions of our courts.

1. *Departing the realm.* And first, as to *departing the realm*, whereby a man withdraws himself from the jurisdiction and coercion of the law of his own country. Whenever a trader hath endeavoured in such manner to avoid his creditors, or evade their just demands, this has uniformly been declared by the legislature to be an act of bankruptcy.

¹ Sect. 5.

² Sect. 6. This act of bankruptcy is re-enacted, and now particularly specified in the 5 & 6 Vict., c. 122, s. 22; see *post*.

³ Sect. 8.

⁴ 5 & 6 Vict., c. 122, s. 20.

⁵ *Id.* s. 21.

⁶ *Id.* s. 22.

For in this extra-judicial method of proceeding, which is allowed merely for the benefit of commerce, the law has always been extremely watchful to detect a man, (whose circumstances are declining,) in the first instance, or at least as early as possible, that the creditors may receive as large a proportion of their debts as may be; and that the trader may not go on wantonly wasting his substance, and then claim the benefit of the statute, when he has nothing left to distribute.¹ And this observation, indeed, applies to every other act of bankruptcy, as well as to the one now under consideration. Slight evidence, of the *intention* to defeat or delay his creditors, will be sufficient to accompany the proof of departing the realm, if it appear that creditors are *in fact delayed*, and that such delay was the *inevitable consequence* of the departure; for it is a principle in law, that every one must be supposed to foresee and intend what is the *necessary consequence* of his own acts;² as, indeed, it is frequently holden in criminal cases, that the plain and palpable consequences of an act done, are, when unexplained, evidence of malice or a felonious intent. Therefore, where a trader fled beyond seas for the murder of his wife, whereby his creditors were delayed, he was held to have committed an act of bankruptcy.³ So, where a married man ran away with a young lady, and took her abroad, where he continued to live with her, and his creditors were thereby delayed in the recovery of their debts,—this was also held an act of bankruptcy.⁴ In both these cases it will be observed, that the parties went abroad under circumstances, that rendered it highly probable they had conceived the *intention not to return* to this country; one having committed murder, and the other being also amenable to the laws of his country for a different offence. And though a party go abroad, with some intention of returning, but does not actually return, nor make provision for the payment of all his debts, this also has been held to be an act of bankruptcy,⁵ and the like, although he went abroad on business, and left a general power of attorney with his clerk to act for him in his absence, but left no provision for the payment of bills falling due.⁶

When the *departing the realm* is of itself equivocal as to the intention, the motive may be collected from the subse-

¹ 2 Bl. Com. 477.

² Per Lord Ellenborough, *Ramsbottom v. Lewis*, 1 Camp. 280. Per Gibbs, C. J. *Holroyd v. Whitehead*, 2 Camp. 530.

³ *Woodier's case*, Bull. N.P.39.

⁴ *Raikes v. Porcous*, 1 C. B. L. 73; and see *Vernon v. Hankey*, 1 C. B. L. 98.

⁵ Ex parte *Kirkman*, 3 D. & C. 450.

⁶ Ex parte *Kilner*, 2 Dea. 324.

quent letters written by the party during the *early part* of his residence abroad; though the declarations of a bankrupt, respecting his motive for doing a particular act, are not receivable in evidence, when made *long subsequent* to the act in question.¹

If a trader, whose house of business is in Ireland, comes to England to settle his affairs, and, upon being informed that one of his creditors intends to arrest him, quits England and goes over to Ireland, in order to avoid such arrest,—this has been held to be such a departing of the realm, as is sufficient to constitute an act of bankruptcy.² But if he leaves England with an honest intention, compatible with trade, and *bonâ fide* intending to return, he does not then, by his departure, commit an act of bankruptcy.³ So, where a trader quitted his residence at Liverpool, and went to Rio Janeiro, having first circulated an advertisement that he was going out there in a particular ship, with an intention of settling there, and would take charge of any shipments by such vessel,—he was held not to have committed an act of bankruptcy; for he would never have circulated such an advertisement, if his intention had been to *conceal* himself from his creditors.⁴ So, a trader, having business both in England and in Spain, has a right to go to the latter country to look after his concerns; and though his creditors in this case may be thereby delayed, yet his departure cannot be construed to be an act of bankruptcy. But if he is actuated also by the fear of arrest,—though such fear concurs with the justifiable motive, namely, that of looking after his business,—then the departure will be an act of bankruptcy.⁵

2. *Being out of the realm, and remaining abroad.*] This was a new and distinct act of bankruptcy created by the 6 G. 4, c. 16, and was intended to save some difficulty that had frequently occurred, as to the proof of *intention in departing* the realm; for, since that enactment, there is no need, as there was in former cases when the party remained some time abroad, to *infer* an intention for his *departure*, which perhaps never mingled with the original motive, nor

¹ *Rawson v. Haigh*, 2 Bing. 99; and see *ex parte Hague*, 1 Rose, 151.

² *Windham v. Paterson*, 1 Star. 144.

³ *Williams v. Nunn*, 1 Taunt. 270.

⁴ *Windham v. Paterson*, 1 Star. 144.

⁵ *Ex parte Osborne*, 1 Rose, 387; and see *Hopkins v. Ellis*, 1 Salk. 110.

⁶ *Warner v. Barber*, 1 Holt, 175.

to construe a continued into a pre-determined absence.¹ The *intention* of the party to *delay* his creditors, however, must be collected, in proving this act of bankruptcy, from the same circumstances as are applicable to the proof of the preceding one. Thus, if a trader, after departing the realm in the first instance for a proper object, protracts his residence abroad for an *unreasonable* length of time, assigning no cause for his absence, and leaving *no funds*, nor making any arrangements in this country for the *payment of his debts*,—it will not be a very hard construction of his conduct, to *infer*, that he “remains abroad with intent to delay his creditors.”²

3. *Departing from his dwelling-house.*] In this case, as in that of departing the realm, the *intention* must be to defeat or delay his creditors. This intention may also, as in that, be manifest, or collected from circumstances, or it may be presumed from the necessary consequences resulting from the departure. The departure must be *voluntary*, and not compulsory; for, where a man is arrested, and thereby obliged to leave his house, such a departure is not an act of bankruptcy.³ But when a trader, from distress of mind, or any other motive, quits his dwelling-house, without any intention to return, and without leaving directions how his business is to be carried on in his absence, and creditors are thereby in fact delayed,—he must in such case, as has been before observed, be taken to foresee and intend the necessary consequences of his own act, whatever the original motive may have been for his departure.⁴

If it is quite clear, that the *intention* is to *avoid his credi-*

¹ See *Ex parte Mutrie*, 5 Ves. 576. *Windham v. Paterson*, 1 Star. 144. 4 Camp. 286. *Ex parte Osborne*, 1 Rose, 387. 1 V. & B. 177. *Ex parte Gulsam*, 1 Atk. 193. In *Windham v. Paterson*, 4 Camp. 286, Lord Ellenborough held, that a continued residence abroad was an act of bankruptcy under the words “otherwise absenting himself,” in the 1 Jac. 1, c. 15; but the learned reporter, in a note to the case, as well as Lord Henley, in his treatise on the Bankrupt Law (p. 16, note g.), questions the correctness of this decision, on the ground that an act of bankruptcy could not then be committed abroad. But it

is submitted, that the *absence from England*, and not any positive act committed abroad, was the gist of the act of bankruptcy in that case; and that it might with equal reason be contended, that *departing the realm* was an act of bankruptcy committed abroad; for the *act of departure* is not strictly *consummated*, until the party actually *reaches* some point out of British jurisdiction.

² And see *Cumming v. Bailey*, 6 Bing. 370.

³ *Phillips v. Sheriff of Essex*, 1 C. B. L. 85.

⁴ *Holroyd v. Whitehead*, 3 Camp. 530.

tors, then it will be immaterial whether any creditor was delayed in his absence, or not. This point, which was often mooted under the former bankrupt law,¹ had, nevertheless, been settled by several cases² before the passing of the 6 G. 4, c. 16; but the words of this statute are also sufficiently declaratory, that the *departure* of itself, coupled with the *intent*, constitute a perfect act of bankruptcy.³ The fact of creditors being delayed may still be properly resorted to in evidence, for the purpose of explaining an act, which might otherwise be equivocal; but where the *intention* is *manifest*, no actual delay need be proved. And this observation applies, not only to this particular act of bankruptcy, but to all the others specified in the third section of the statute.

The *distance* that a man departs to, after leaving his dwelling-house, or the *period of time* that he is absent from it, are also perfectly immaterial, if the real motive is concealment from his creditors. His going to a distant place among strangers may be an act of bankruptcy, though he is visible there; and the going only to the next house, may also be the same, if he is not visible.⁴ Thus, where a man rode out of town in order to avoid being arrested, and returned in the evening, and the next morning sent for the bailiff, and told him he went out in order to get the term of the plaintiff,—this was held to be such a departing from the dwelling-house, as was sufficient to constitute an act of bankruptcy.⁵ So, where a trader went to his neighbour's house, and told him he expected every moment to be arrested, and, while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in a back room, desiring his neighbour to watch, and when told that the officer had gone past his house, and had left the street, immediately returned home,—this temporary absence from his dwelling-house was held to be an act of bankruptcy;⁶ and indeed it would make no difference, if his departure from his dwelling-house had proceeded from a *groundless apprehension* of being arrested.⁷ In such a case

¹ *Barnard v. Vaughan*, 8 T.R. 149.

² *Robertson v. Liddell*, 9 East, 487. *Hammond v. Hicks*, 5 Esp. 139. *Williams v. Nunn*, 1 Taunt. 270. *Wilson v. Norman*, 1 Esp. 334. *Holroyd v. Whitehead*, supra. Ex parte *Wydown*, 14 Ves. 84.

³ *Roach v. Great Western Railway Company*, 4 Per D. 686. 1 Q. B. Rep. 51.

⁴ Per Buller, J., *Aldridge v. Ireland*, cit. 1 Taunt. 273.

⁵ *Maylin v. Eyloe*, 2 Str. 809.

⁶ *Chenoweth v. Haley*, 1 M. & S. 676; and see *Bayley v. Scholefield*, 1 M. & S. 338. *Johnston v. Woolf*, 2 Scott, 372.

⁷ Ex parte *Bamford*, 15 Ves. 449.

it is not necessary, in order to prove the act of bankruptcy, to show that any writ had in fact issued against the bankrupt.¹ And if a trader, on an execution being put into his house, shut up his shop and goes from home for two days, without leaving any directions in case of creditors calling for the payment of their debts; and during his absence a creditor calls, and is unable to discover where he is to be found; this will also amount to an act of bankruptcy.² And where a trader, on being applied to for payment by a creditor, left his house under pretence of getting money, but went to a billiard-table, and remained there the whole evening,—this was likewise held to be an act of bankruptcy.³ In one case it was held, that the departure will not be an act of bankruptcy, unless it is accompanied with an *absolute* intent to delay creditors; and that if it be only with intent to delay creditors, *in case a particular event occurs*, and that event does not occur, it is not an act of bankruptcy.⁴

In all these cases we have seen, that the departure from the dwelling-house has originated from the fear of meeting a creditor, the apprehension of being arrested, or from some desire of concealment, in consequence of the trader's embarrassments. But where it is clearly *not his intent*, in going from home, to defraud or delay his creditors, but his motive is laudable,—as if he departs on a journey for the purpose of getting in money owing to him,—he does not thereby commit an act of bankruptcy, though his absence is actually productive of delay to some of his creditors. Thus, where a trader at *Manchester*, receiving intelligence that a debtor of his in *London* was in a failing condition, left his house and went to *London*, for the purpose of arranging his affairs with his debtor and getting security for his demand, he was held not have committed an act of bankruptcy,—though he stayed away ten days, and several of his creditors in his absence called at his house at *Manchester* for payment of their debts, and went away unsatisfied, from no provision being made for payment of them; for it was considered, that his intention in going from home was not to *delay* his creditors, but for the purpose of obtaining money to *prevent* their being delayed.⁵ So, where a female trader left her house at *Bath*, for the purpose of persuading one of her creditors in *London* to withdraw an execution against her stock, and previously told her servants *where she was going*,

¹ *Wilson v. Norman*, 1 Esp. 334.

² *Ex parte Auden*, 2 Dea. 533.

³ *Bigg v. Spooner*, 2 Esp. 651.

⁴ *Fisher v. Boucher*, 10 B. & C. 705. *Quære tamen.*

⁵ *Fowler v. Padget*, 7 T. R. 509.

as well as the object of her journey, and also left with them her direction for any person who might inquire for her;—this again was held to be not an act of bankruptcy; as there appeared to be no wish to keep out of the way of her creditors, who had only to call at her house to know *where* she was.¹ But, if a country banker goes to London for a lawful purpose,—as for the purpose of raising money, and after his exertions fail, he remains there for the purpose of avoiding his creditors, that amounts to an act of bankruptcy by absenting himself.²

So, the leaving home *bonâ fide* for exercise, or entertainment, or any other lawful purpose, is not an act of bankruptcy, notwithstanding a creditor may in the interim call in vain for his debt.³ Thus, where a man went from home, leaving word with his clerk *what time* the same day he should return home, and actually did return at the appointed time,—this was held not an act of bankruptcy, though a creditor called for money in his absence, and his clerk, by his directions, told the creditor that he would not let him have it, and that he would be out of the way till dinner-time; for a man, who intends to delay a creditor, does not usually *name the hour* when he is on the same day to be met with at home.⁴ So, if a man absents himself from his house, in order to *avoid harsh language* from some of his creditors, whom he had appointed to come to his counting-house and examine his books, he does not thereby commit an act of bankruptcy; for the motive was not to delay the creditors, but to avoid altercation with them.⁵

It is laid down in some of the books,⁶ that there is a difference between absconding to avoid a *debt*, and absconding to avoid a *duty* only; and that a departure, occasioned by the fear of being attached for the non-performance of an *award*, or to avoid an arrest upon a writ of *excommunicato capiendo*, is not an act of bankruptcy. But this position, it is apprehended, must now receive some qualification; for if the absence is *indefinite*, and no provision is made for payment of debts, nor any directions left for creditors *where he may be found* by them, such a departure would now be held to fall within that class of cases, which establish that a

¹ *Aldridge v. Ireland*, cit. 1 Taunt. 273; but see *Deffe v. Desanges*, 8 Taunt. 671. 3 Moore, 7. post, 52.

² *Cumming v. Bailey*, 6 Bing. 370.

³ Per Ld. Ellenborough, 9 East, 492. *Robertson v. Liddell*.

⁴ *Vincent v. Prater*, 4 Taunt. 603.

⁵ *Ibid.*

⁶ *Lingood v. Eade*, 1 Atk. 196. 2 Com. Dig. 5.

man is taken to intend what is the necessary consequence of his own acts.¹

4. *Otherwise absenting himself.*] Where a man has a counting-house distinct from his dwelling-house, and leaves the former, without the *animus revertendi*,—though he may remain afterwards two or three days at his dwelling-house,—he begins to absent himself from the time he leaves his counting-house, and the act of bankruptcy is complete by such departure from it.² Indeed, it may frequently happen, that a trader has neither dwelling-house, nor counting-house,—in which case his withdrawing himself from the usual place where he is to be found, or where he transacts his business, will be sufficient to constitute an act of bankruptcy, within the meaning of the words “*otherwise absenting himself*,” which are not confined to any particular place.³ Therefore, if a man, who has no settled home, takes up a *temporary abode* at a public-house in the town to which his business carries him, and leaves it for fear of his creditors,—this will be considered an act of bankruptcy.⁴ So, if a man, who has no known place of abode, is in the habit of attending the Royal Exchange to transact his business, and leaves it on the approach of his creditors, desiring a friend to say he is not there; or if he breaks an appointment made by him with a creditor to meet him there to pay his debt—either of these cases will be an act of bankruptcy.⁵ So also, where the proprietor of a theatre retired behind the scenes to avoid a sheriff’s officer, giving orders at the same time to be denied to him,—this was held to be such an absenting himself, as came within the meaning of the former statute.⁶ And the like, where a man was arrested for debt, and escaped to the house of another person, and was there denied to the officer who pursued him.⁷ So, where a man abstained from going to a particular place, through the apprehension of process, it was held, that (whether such apprehension was well founded or not) he thereby “absented

¹ Ante, page 45.

² *Judins v. Da Cossen*, 1 N. R. 234, and see *Spencer v. Billing*, 3 Camp. 312. There is a case of *Young v. Wright*, 6 Taunt. 540, usually referred to upon this head; which, however, seems to establish no satisfactory position.

³ *Cambridge v. Anderson*, 1 C. & P. 213. *Hallen v. Homer*, 1 C. & P. 108.

⁴ *Holroyd v. Gwynne*, 2 Taunt. 176.

⁵ *Gimingham v. Laing*, 2 Marsh. 236. 6 Taunt. 532. And see *Bernasconi v. Farebrother*, 10 B. & C. 549.

⁶ *Ibid.*

⁷ *Bayley v. Schofield*, 1 M. & S. 338.

himself, with intent to delay his creditors.¹ But a mere breach of engagement to meet a creditor at a given place is not, in itself, evidence of an act of bankruptcy, without proof that the absence was with a view to *delay* the creditor.² Where that intent, however, is clear, it then amounts to an act of bankruptcy,³ notwithstanding the place at which the appointment is made is not his usual place of business.⁴

Where a trader in insolvent circumstances offered a composition to his creditors, and his solicitor, with his privity, called a meeting of his creditors to be held in the place where he carried on business, for the purpose of having a statement made to them of his affairs, but he absented himself from this meeting; it was held that his so absenting himself amounted to an act of bankruptcy, although he made no express promise to attend, and although his solicitor did in fact attend to explain the state of his affairs.⁵ And in a similar case, where the trader attended the meeting of creditors, and, upon retiring to an outer room until they could come to some resolution, was served with a copy of a writ, upon which he abruptly left the place of meeting altogether, and did not return for an hour, when the meeting had broken up; this also was held to amount to an act of bankruptcy.⁶ So, where two partners left their shop, and told their shopman that they were going out to endeavour to get some bills discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call; and a jury found that they absented themselves with an intent to delay their creditor, the court of Common Pleas held they were warranted in such conclusion.⁷ And the like, where the jury found the same intent, in a case where the creditor called by appointment on his debtor, who, upon seeing his creditor, immediately left the room.⁸

5 *Beginning to keep house.*] This act of bankruptcy is generally made out, by proving the party to have been

¹ *Robson v. Rolls*, 9 Bing. 648.
2 Mon. & S. 786.

² *Tucker v. Jones*, 2 Bing. 2.
Key v. Shaw, 8 Bing. 320. Ex parte
Lavender, 4 D. & C. 484.

³ *Butcher v. Wroughton*, Mont.
& M. 438, note.

⁴ *Russell v. Bell*, 10 Mees. & W.
340.

⁵ Ex parte *Beer*, 1 M. D. & D.
390.

⁶ Ex parte *Dean*, 2 M. D. & D.
127.

⁷ *Defle v. Desanges*, 8 Taunt.
671. *Capper v. Desanges*, 3 Moore, 4.

⁸ *Charrington v. Brown*, 11
Moore, 141.

denied by his own orders to a creditor who calls for payment of his debt, the party himself being at home at the time. The mere *denial*, however, is not of itself *the act of bankruptcy*, but only *prima facie* evidence of the party keeping his house, with intent to delay his creditors; and this may be proved in many other ways, besides being denied to a creditor; though it seems to have been for some time held, that an actual denial was indispensable in proof to establish this act of bankruptcy.¹ But, as it is the *intent* to delay, and not the *actual* delay, which must accompany the beginning to keep house,—there is no obligation to prove that the intention was *effected*, if there are circumstances enough to show what the intention really was. Therefore the *intention* of keeping house being clearly proved by other evidence, there is no necessity to superadd the proof of denial to a creditor; a species of evidence, indeed, which need never be resorted to, except for the purpose of explaining conduct that might otherwise be deemed equivocal. For instance,—if a trader gives *general orders* to be denied, then the fact of a *creditor* calling and being denied will be important evidence, not only of the beginning to keep house, but also to show what the *intention* of the party was in giving such orders. Or, if he direct his servant to deny him to some individual by *name*, then it will be essential to prove that that individual was a *creditor*,—and if there is no other evidence of keeping house, then that such person actually called and was denied.² Thus the necessity of proving an *actual denial* to a creditor occurs only, where there is otherwise no evidence of keeping house, or of what the *intention* of the party is in keeping house. Where it is said, therefore, in some of the books,³ that there must be an *actual denial*, as well as an *order* to deny, to constitute an act of bankruptcy, this must be understood to apply to cases, where there is *no other proof* of the party beginning to keep house.

But it is proposed to consider first the cases, where the *denial to a creditor* forms the principal ingredient in the proof of the party beginning to keep house, before we treat of those, where other circumstances have been admitted to establish this particular act of bankruptcy.

In the first place, the denial must be in consequence of *previous directions* from the debtor; for unless it is so, no

¹ Garratt v. Moule, 5 T. R. 575.
Hawkes v. Saunders, C. B. L. 74.

² Fisher v. Boucher, 10 B. & C. 705.

³ Jackmor v. Nightingale, Bull. N. P. 40. 1 C. B. L. 79.

subsequent approbation of it by him will render it an act of bankruptcy.¹ But if a trader *hear* himself denied to a creditor by one of the family, and does not then come forward, and his remaining quiescent is from an intention to delay the creditor; this will amount to an act of bankruptcy.² The denial must be to a *creditor*, whose debt is *then due*; for if he is only a creditor by a note payable at a *future* day, a denial to such a creditor will not be an act of bankruptcy;³ since no creditor can be said to be defeated or delayed in the recovery of a debt, where there is no debt which he can legally demand the payment of. In such a case, however, it is conceived, if the order to be denied was given under an apprehension that *other creditors, whose debts were due*, would call,—then the actual denial, being proof (at all events) of keeping house, would, coupled with proof of the *intent* of the party in ordering himself to be denied, constitute a perfect act of bankruptcy.

The better opinion seems to be, that the denial *need* not be to the creditor *himself*, but that it will be sufficient, if made to the clerk of the creditor, or any other person coming on his behalf, and by his authority, to demand the debt,—upon proof that the trader knew him to be such clerk, or agent;⁴ though Lord Camden, at *Nisi Prius*, once held the contrary.⁵ And a denial to the clerk of the creditor is equally an act of bankruptcy, notwithstanding the clerk only asks to see the creditor, and does not ask for money, if, in fact, the clerk did, to the knowledge of the debtor, call for money.⁶ So a denial to a *tax-gatherer*, who calls for taxes, is also an act of bankruptcy; for the *tax-gatherer* is an agent on behalf of the crown, and the crown cannot be said, in this instance, not to be a creditor.⁷ And the like has been held, where the denial was to the *collector of the church and highway rates*, who may be equally considered a creditor,—the debt in this case being created by the assessment, and when the assessment is made, the debt then becoming due and demandable.⁸ And whether the creditor calls for payment of his debt, or security for it, or to buy goods to the amount in order to cover it,—a denial will be equally an act of bankruptcy; for the statute does not contemplate the *object of the creditor* in

¹ *Ex parte Foster*, 1 Rose, 50.

⁵ *Barrow v. Foster*, C. B. L. 83.

² *Smith v. Moon*, 1 Mood. & M. 458.

⁶ *Hughes v. Gilman*, 10 Moore, 480. 2 C. & P. 32.

³ 7 Vin. Ab. 61. pl. 14. *Ex parte Levy*.

⁷ *Jeffs v. Smith*, 2 Taunt, 401.

⁴ *Bramley v. Mundle*, B. N. P. 39. *Ex parte Bamford*, 15 Ves. 449.

⁸ *Lloyd v. Heathcote*, 2 Brod. & B. 388. 5 Moore, 129.

calling, but the *intention of the debtor* in being denied.¹ But if the trader knows that the creditor is coming upon some other business, and not for payment or satisfaction of his debt, and refuses to see him,—then, the moment his knowledge of that purpose is proved, his intention to delay will be negatived.² And it has been ruled at *Nisi Prius*, that a denial to a bailiff, who had previously arrested the party, and released him on his undertaking to give bail, was not an act of bankruptcy,—on the ground, that the denial was not to avoid a creditor, but merely to avoid the execution of a bail-bond.³

A denial to several persons, whom the servant of the bankrupt, from their frequent calling, believed to be creditors, is evidence to go to a jury to say whether they were creditors or not.⁴ And it has been also held to be an act of bankruptcy, where the bankrupt was denied to a person calling to make inquiries about a dishonoured bill of exchange, whom the bankrupt considered to be a creditor.⁵

A denial to a creditor, though he demands payment of his debt,—yet if he does not ask for the debtor, or express a wish to see him personally, it has been said, is incomplete proof of the party keeping house.⁶ But such a transaction does not in fact amount to a *denial*; for where there is no request to see, there can be no *denial* to be seen. The circumstance, however, of the creditor *calling for his debt* would go far to explain the *intention* of the party in giving orders to be denied,—and, with very slight evidence of keeping house, would probably be sufficient to establish an act of bankruptcy.

It is no objection to the proof of beginning to keep house, that, when the trader was denied, he was actually seen by the creditor through the window of a partition, and was heard giving directions to be denied.⁷

The fact of keeping house is not construed to mean *strictly* his *own* dwelling-house; for, it is held, that, if a man have no house of his own, and keep in another man's house,—that would be within the meaning of the statute;⁸ and the same, when a party keeps on ship-board, or a miller keeps

¹ Ex parte *Harris*, 2 Rose, 67.
Ex parte *White*, 3 Ves. & B. 128.

² *Ibid.*

³ *Schooling v. Lee*, 3 Sta. 151.
Sed quære, whether such a denial ought not to be construed with an *intention to delay* a creditor; and whether it does not fall within the principle of that class of cases, in which it is held, that a party, keep-

ing out of the way to avoid an arrest, commits an act of bankruptcy?

⁴ *Jameson v. Eamer*, 1 Esp. 381.

⁵ *Bleasby v. Crossley*, 2 Car. & P. 213.

⁶ *Dudley v. Vaughan*, 1 Camp. 271.

⁷ Ex parte *Bamford*, 15 Ves. 449.
Key v. Shaw, 8 Bing. 320. 1 Moore & T. 462.

⁸ *Bailey v. Schofield*, 1 M. & S. 338,

himself within his mill, or a churchwarden within his church.¹ Accordingly, where a trader, carrying on business at Warwick, came occasionally to London to make purchases for his trade, and while in London was frequently at the counting-house of a correspondent, where other persons were in the habit of calling upon him,—it was held, that his desiring his correspondent to deny him to a creditor whom he expected to call, and concealing himself in his correspondent's house when the creditor did call, was such a beginning to keep house as amounted to an act of bankruptcy.² In one case, indeed, it was laid down, that a creditor has a right to call on his debtor *where he pleases*, to demand payment of his debt,—and that a denial to a creditor *at any place*, though not the bankrupt's usual place of business, was equally an act of bankruptcy.³ But it is apprehended that this proposition is laid down too broadly to stand the strict test of examination; and that the denial must be at a place, which was then either the bankrupt's place of residence, or that of his common resort,—or one, at least, where he had appointed a creditor to meet him, or where he had taken a temporary shelter for the purpose of concealment.

Where a debtor is always accessible to his creditors at his place of business in London, but declines to see a creditor upon his applying at his country house, the answer ought to be, not "that he is not at home," but "that he attends to business only in London."⁴

When the party has *once* been denied by his own orders to a creditor, with a view to delay him, though the creditor is delayed but for one hour, and is in fact afterwards admitted in consequence of his importunity⁵,—the denial will nevertheless be an act of bankruptcy. Thus, where a trader denied himself at *nine in the morning* to a creditor, presenting a bill for payment,—though he afterwards in the course of the day appeared in public, and paid the bill before *five o'clock in the afternoon*,—this was held to be an unequivocal act of bankruptcy, which could not be explained away by subsequent circumstances.⁶ So, where a trader gave a general order to be denied, and was in consequence denied to a particular creditor, whom it was *not his object to be denied to*,—though he immediately overtook the creditor, and said he was not afraid of *him*, but of *another* creditor,—

¹ Com. Dig. "Bankrupt," c. i. Cullen, 37.

² *Curtis v. Willis*, 1 Ryan & M. 58. Dowl. & R. 224.

³ *Park v. Prosser*, 1 Caring. 176.

⁴ *Park v. Prosser*, 1 C. & P. 176.

⁵ *Wood v. Thwaites*, 3 Esp. 245.

⁶ *Colkett v. Freeman*, 2 T. R. 59.

this was held also such a beginning to keep house, as was sufficient to constitute an act of bankruptcy.¹

There are many acts of denial, however, even to a creditor, which may be explained by circumstances, to show that there was *no intention to delay* the creditor, but that the denial proceeded from another motive,—such as being engaged with company or business, by a temporary retirement and privacy during a period of sickness or domestic affliction, or during the ordinary hours of sleep or refreshment.² Thus, where a creditor had been in the habit of calling whilst the trader was at dinner, who told his servant that the creditor was troublesome in calling for money at that hour, and desired he might be denied to him; and the creditor called twice afterwards, when the trader was denied, but was accessible to all his other creditors at business hours;—this was held to be not an act of bankruptcy.³ Neither is it an act of bankruptcy for a man to cause himself to be denied on a Sunday, notwithstanding the creditor may have been even appointed to call on that day for the express purpose of receiving his money.⁴

But where a trader has once given a *general order* to be denied to creditors, it will be no excuse that he happens to be ill in bed, when a creditor afterwards does call for his debt; for the denial in this case will be referable to his previous orders, and not to his sickness as the cause.⁵ Where the trader is denied by his wife, though the wife herself cannot be called to prove the denial, yet other witnesses may prove that her husband gave her orders to deny him, and that she did actually deny him to some creditors who called.⁶

A denial to a creditor, however, though conclusive evidence, if unexplained, of a beginning to keep house,—yet, as has been before observed, it is not the *only* evidence by which this act of bankruptcy can be established. Thus, if a man shuts himself up for a month in his bed-chamber, with the exception of Sundays, giving directions merely to be denied to every body that called,—this will not only be sufficient proof of his *keeping his house*, but of his doing so

¹ *Mucklow v. May*, 1 Taunt. 479.

² *Ex parte Hall*, 1 Atk. 201.
Field v. Bellamy, B. N. P. 39. *Ex parte Preston*, 2 Rose, 21. 1 Burr. 484. *Stafford v. Clarke*, 1 Carringt. N. P. Rep. 159. *Hughes v. Gilman*, 10 Moore, 480. 2 C. & B. 32.

³ *Smith v. Currie*, 3 Camp. 349.

Shaw v. Thompson, 1 Holt. 159.

⁴ *Ex parte Preston*, 2 Rose, 21.

2 Brod. & B. 312.

⁵ *Lazarus v. Wraithman*, 5 Moore, 363.

⁶ *Lloyd v. Heathcote*, 2 B. & B. 389. 5 Moore, 129.

with intent to delay his creditors.¹ So, where a merchant left his counting-house where he usually sat, and retired into a secluded parlour, where he drew the curtains to prevent being seen, and during such seclusion several creditors called, who must have seen him, had he remained in the counting-house,—such a concealment was held sufficient evidence of an act of bankruptcy.² So, where a trader desired his servants not to let into the house any persons whom they did not know, for fear of being arrested,—and on the following morning the doors of the house were kept shut, and no person was admitted, until it had been ascertained from the window who he was,—it was held that this amounted to an act of bankruptcy, though no creditor was actually denied.³ If the trader, also, has no clerk or servant,—as the act of keeping house cannot then of course be evinced through the medium of a *denial*,—it will be amply proved, in such a case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed. And, indeed, it may be laid down generally, that wherever a trader secludes himself in his house, to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him,—he begins to keep house, within the meaning of the statute.⁴

There may also be circumstances in a man's conduct where he has given no orders to be denied, and where there is not proof of a complete seclusion, which will amount to an act of bankruptcy, under this head of *beginning to keep house*. As where a trader, whose counting-house was in a town, and his dwelling-house in the country, did not go to his counting-house, nor into the town,—but sent for his papers to be brought to his dwelling-house, and only went out for the purpose of taking an evening walk in the country;—Lord Eldon said there was no doubt but that that sort of keeping house would be an act of bankruptcy.⁵

A banker *stopping payment*, or refusing to pay money when called upon for that purpose, does not thereby commit an act of bankruptcy,—if he keeps his shop open, and does not conceal himself.⁶ And the shutting up a banker's shop

¹ *Bayley v. Schofield*, 1 M. & S. 349. *Lloyd v. Heathcote*, *supra*.

² *Dudley v. Vaughan*, 1 Camp. 271. *Castell's Bankruptcy* cit. per Bayley J., 1 M. & S. 354. And see *Key v. Shaw*, 8 Bing. 320. 1 Mo. & S. 462.

³ *Harvey v. Ramsbottom*, 1 B. & C. 55.

⁴ Per Lord Ellenborough, 1 Camp. 272.

⁵ Ex parte Bourne, 16 Ves. 149.

⁶ *Hopkins v. Grey*, 7 Mod. 139. *Pakenham v. Bland*, Ca. in Chancery, in Lord King's Time, 42, 43. 7 Ba. Ab. 61. pl. 12, 13.

by one partner, is not an act of bankruptcy in his co-partner residing in another place.¹ But closing the doors and shutters of a banking-house, where all the partners order this to be done, and are within the banking-house when it is shut up, and when people are clamorous for admission, is an act of bankruptcy, although neither of the partners live at the banking-house.² And it seems, that if any trader shut up his shop without making any provision for the payment of creditors, it would be an act of bankruptcy; for if he remains within, it would be a *keeping house*,—and if he is not, it would be an *absenting himself*.

In all these cases of *keeping house*, as well indeed as in those of *departing from his dwelling-house*, or *absenting himself*, what the party says to his servant, or any other person, *when* he begins to seclude himself, is receivable in evidence to prove the *intention*; ³ but what he says must be contemporary with, or immediately subsequent to, the act done.⁴

6. *Suffering himself to be arrested for any debt not due.*⁵] The object of this enactment was no doubt, to provide against a voluntary submission to an arrest for a fictitious debt; but it would apply also to an arrest upon a bill of exchange *not due*, or indeed for any debt *solvendum in futuro*, if the *intention* was to defeat or delay a creditor. This act of bankruptcy, however, has now become obsolete, since the abolition of arrest on mesne process by the 1 & 2 Vict. c. 110.

7. *Yielding himself to prison.*⁶] The yielding must of course be voluntary, and not compulsory, and the intent, to defeat or delay a creditor. But a *bonâ fide* surrender in discharge of bail was held not to come within this act of bankruptcy; it being a duty incumbent upon every defendant, if necessary, to exonerate those who have become sureties for him in the action; and as the bail have a right to take and render a defendant in their own discharge, (he being, in the eye of the law, already in their custody,) a voluntary

¹ Ex parte *Mavor*, 19 Ves. 543.

² *Cumming v. Baily*, 6 Bing. 363.

³ *Jameson v. Exmer*, 1 Esp. 381. *Bateman v. Bailey*, 5 T. R. 512. B. N. P. 40. *Ambrose v. Clendon*, Annals, 267. 4 Esp. 233. *Wilson v. Norman*, 1 Esp. 334. *Robertson v. Liddell*, 9 East, 487.

⁴ *Robson v. Kemp*, 4 Esp. 231.

Marsh v. Meager, 1 Star. 353; and see post, title "Evidence."

⁵ This was also an act of bankruptcy by 13 Eliz. c. 13, and 1 Jac. 1, c. 15, s. 2.

⁶ This is also taken from the above-mentioned statutes of Eliz. and James.

surrender would be only doing that which he might be at any time compelled to do by his bail. If a trader, however, who is capable of paying, will, from *fraudulent motives*, voluntarily go to prison,—that will be an act of bankruptcy. Therefore where a man was arrested for 28*l.*, and, though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition,—he was held to have committed an act of bankruptcy.¹ But this act of bankruptcy, like the last, has now become nearly obsolete.

8. *Suffering himself to be outlawed.*²] An outlawry in Ireland will not make a man a bankrupt here; for that is considered as an act of bankruptcy committed abroad.³ And an outlawry suffered, without the intent to defeat or delay a creditor, is not an act of bankruptcy.⁴ It is laid down by Lord Chief Baron Comyns,⁵ (upon the authorities, as it is presumed, which are cited below,⁶ but he himself cites no authority for the position,) that the outlawry will not be an act of bankruptcy, if it be reversed before the commission of bankrupt issues, or if it be reversed for default of proclamations, even after the commission. There is some qualification, however, as to this last position, in Viner, which is not noticed by Comyns; the passage in Viner being, “if the outlawry be reversed for want of proclamations, all that is done in the meantime by the commissioners is void; *contra*, if it was reversed *on a writ of error*.” But this can scarcely now be considered as law; for, if the outlawry were suffered fraudulently *ab initio*, with an *intention* to defeat or delay a creditor, no subsequent event would, it is submitted, be sufficient to clear the fraud, or prevent the operation of the bankrupt law, any more than a denial to a creditor, once made with intent to delay him, can be explained away by any subsequent circumstances.⁷

9. *Procuring himself to be arrested.*] This act of bankruptcy is taken from the 1 Jac. 1, c. 15, s. 2. Any arrest made by a man’s own procurement would come within this head of bankruptcy, it being immaterial whether the arrest

¹ *Ex parte Barton*, 7 Vin. Ab. 61.

² This is also from the two statutes of Eliz. and James.

³ Com. Dig. “Bankrupt,” C. 4.

⁴ *Bradford v. Bloodworth*, 1 Keb. 11. 1 Lev. 13.

⁵ Com. Dig. “Bankrupt,” C. 4.

⁶ 7 Vin. Abr. 61, pl. 10 R. S. L. 186. *Stone’s Read.* 124.

⁷ See ante, p. 56; and C. B. L. 85.

is for a real, or a fictitious debt. But this act of bankruptcy has also, since the abolition of arrest for debt, now become obsolete.

10. *Procuring his goods, money, or chattels to be attached, sequestered, or taken in execution.*] This act of bankruptcy was also included in the 1 Jac. 1, c. 15, s. 2, with the exception only of the last words, which were very properly added in the 6 Geo. 4, c. 16; it having been holden under the statute of James, that a fraudulent *execution*, though void as against creditors, was not a *procuring of goods to be attached*,—which meant only a proceeding by *foreign attachment* in London, or in those other towns where that species of process is used.¹

An *attachment*, for *mere default* or *laches*, is not an attachment within the meaning of the statute;² for such an attachment cannot be considered to be with a defendant's own *procurement*. A *sequestration of tithes*, also, issued against a person who has a rectory impropriate, for not repairing the chancel of his church, is for the same reason not an act of bankruptcy.³ The *procuring of the goods to be taken in execution* has no effect as an act of bankruptcy, until the goods are actually taken.⁴ And where a trader, hearing that a writ of *fi. fa.* was issued against him, clandestinely conveyed his goods out of his house, and concealed them privately, in order to prevent them from being levied in execution,—this, it was determined, though a palpable fraud, did not amount to an act of bankruptcy.⁵

11. *Making or causing to be made, either within this realm, or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels.*] This act of bankruptcy is taken from the 1 Jac. 1, c. 15, s. 2, but it includes any grant or conveyance *executed abroad*, as well as those executed in this country; it having been decided under the statute of James, that a deed executed in India, or any *foreign country*, was not an act of bankruptcy, on the ground that no act of bankruptcy could be committed abroad.⁶

The grant or conveyance contemplated by the statute is a grant or conveyance *by deed*, with a proper stamp affixed to it; for, if the instrument only amounts to an *agreement* to

¹ *Clarey v. Hayley*, Cowp. 427.

Harman v. Spottiswood, cit. ibid.

² *Gibson v. King*, 1 Car. & M. 458.

³ Com. Dig. "Bankrupt," C. 2.

⁴ *Gibson v. King*, 1 C. & M. 458.

⁵ *Cole v. Davies*, 1 Ld. Raym. 724.

⁶ *Inglis v. Grant*, 5 T. R. 530.

Norden v. James, Dick. 533.

transfer or assign any part of a trader's effects, or an *agreement* to accept a composition, it is not an act of bankruptcy under the above head.¹ But it is enough that the deed is executed by the bankrupt only, although it is not proved to have been acted upon, or to have passed out of the bankrupt's hands.²

There are two species of fraudulent conveyances comprehended within the statute; 1st, those which are void, either at common law for fraud, or under the statute of fraudulent conveyances, 13 Eliz. c. 5; 2ndly, those which have been considered fraudulent as an evasion of the bankrupt law, by distributing the trader's property in a mode, and in proportions, different from what that law permits. And, indeed it has been said, that *every case*, of an act of bankruptcy *by deed*, proceeds upon the ground of its being a fraud upon the bankrupt law.³

With respect to the first class of conveyances, it would be far beyond the limits of the present treatise to enumerate the various cases that come within it, and which must necessarily depend each upon its own peculiar circumstances. It must suffice on the present occasion to observe, that suspicion always attaches to a deed which is executed in a *clandestine manner*, or at an *unseasonable hour*; to one which is *falsely dated*, or contains *unusual covenants*, or is made *without consideration*, or where, being an assignment of goods and chattels, it is *not accompanied by the delivery* of them to the assignee. To invalidate a deed, by the statute of Elizabeth, it is not necessary to show that the party was insolvent; the question being, whether the deed was made to hinder and delay his creditors, by placing the property out of their reach.⁴ For further information on this head, the reader is referred to the numerous cases in the books, some of which are mentioned in the note.⁵

¹ *Whitwell v. Dimsdale*, Peake, 168. *Whitwell v. Thompson*, 1 Esp. 68. *Jolly v. Wallis*, 3 Esp. 228. *Martin v. Peatress*, 4 Burr. 2477. *Dutton v. Morrison*, 17 Ves. 202.

² *Botcherby v. Lancaster*, 1 Ad. & E. 77.

³ *Rust v. Cooper*, Cowp. 629.

⁴ *Richards v. Smallwood*, Jacob, 557.

⁵ *Edwards v. Harben*, 2 T.R. 587. *Wordall v. Smith*, 1 Camp. 833. *Bucknall v. Roiston*, Prec. Chan. 287. *Lord Cadogan v. Kennett*, Cowp. 432.

Haselinton v. Gill, 3 T.R. 620, n. 10 Ves. 145. *Kidd v. Rawlinson*, 3 Esp. 52. 2 B. & P. 59. *Meggott v. Mills*, 1 Ld. Raym. 286. *Cole v. Davis*, Ibid. 724. *Dewey v. Bayntun*, 6 East, 257. *Jones v. Dwyer*, 15 East, 21. *Leonard v. Baker*, 1 M. & S. 251. *Watkins v. Birch*, 4 Taunt. 823. *Reed v. Blades*, 5 Taunt. 212. *Hartley v. Smith*, Buck. 368. And see also Sir W. Evans's "Compendium of the Law upon the Statutes of Fraudulent Conveyances."

To the *second* class of conveyances, therefore, it is proposed chiefly to confine our attention; namely, those which are held void, as being in contravention of the *bankrupt law*, and which, if made by any other person than a trader, would not be considered fraudulent or void. For a conveyance by a man who is not in trade, either of *all* his property for the benefit of his creditors,¹ or an assignment of *part* to one creditor in preference to another,² would in neither case be void, except as it was opposed to the policy of the bankrupt law.

Under the former statutes it was originally decided, that, in order to construe a conveyance of a trader's lands or effects to be an act of bankruptcy, it must have been a conveyance of *all*³ his lands, or effects, or of so great a portion of the latter, that it would not be possible for him afterwards with the remainder to carry on his business⁴; for it was held, that he might lawfully make a mortgage of *part* of his lands, or assign *part* of his effects with possession delivered, to any particular creditor, without its being deemed fraudulent, or an act of bankruptcy.⁵ If any *part* of his estate or effects was *excepted* in an assignment, which purported to be an assignment of *all*,—then the question was, whether the exception was colourable, or not.⁶ This construction was consistent with the enactment of the statute then in force relating to this particular act of bankruptcy,—the words of the 1 Jac. 1, c. 15, s. 2, being “any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels;” and not, as in the 6 Geo. 4, c. 16, “any fraudulent grant or conveyance of *any* of his lands, &c.” Another and more modern class of cases extended this rule of construction, by holding, that, where the effect of an assignment would be to prevent a fair and equal distribution amongst the creditors, —then the assignment of only *part* of the effects, and though made to a *bonâ fide* creditor, if made in contemplation of bankruptcy, became itself the very act⁷; for, though not a conveyance of *all* his effects, it was nevertheless, as to the *part* actually conveyed, a means whereby his other creditors might be defeated or delayed; and this last mode of con-

¹ *Pickstock v. Lyster*, 3 M. & S. 371. *Goss v. Neale*, 5 Moore, 19.

² *Estwick v. Cailland*, 5 T. R. 424. *Jagtis v. Grant*, *Ibid.* 530. *Nunn v. Wilmore*, 8 T. R. 528. *Meux v. Howell*, 4 East, 1.

³ 1 Burr. 467.

⁴ Doug. 295. 1 Bl. 362. *Law v. Skinner*, 2 Bl. 996.

⁵ *Wilson v. Day*, 2 Burr. 830.

⁶ *Gayner's case*, *cit.* 1 Burr. 477.

⁷ *Cowp.* 124. *Linton v. Bartlett*, 3 Wils. 47. *Devon v. Watts*, Doug. 86. *Whitwell v. Thompson*, 1 Esp. 68.

struction is consistent with the words and the spirit of the present enactment. As the law now stands, therefore, any grant or conveyance of *any portion* of a bankrupt's property, which may give an undue preference to any particular creditor,—or which, in the words of the statute, may be made “with intent to defeat or delay his creditors,” generally,—will be considered an act of bankruptcy; the material thing for consideration being, the *intent and purpose* of the bankrupt in making the grant or conveyance.

But, *first*—as to those cases where a trader conveys the *whole* of his effects.

A grant or conveyance of the *whole* of a trader's property is equally an act of bankruptcy, although it is not made with intent to defeat or delay his creditors; for, as that is the necessary consequence of the assignment, he must, in law, be taken to have intended it.¹ And, though such a conveyance may be valid as between the bankrupt and the other party to it, it may be fraudulent by reason of collusion or deceit on the part of the trader, and its tending to the injury of his other creditors; as where he *continues in possession* of the property assigned, by which means he obtains a false credit among those who deal with him. Thus, where a trader assigned *all* his estate and interest in certain premises, and also all his stock in trade to a particular creditor, for the purpose of securing him the repayment of advances, at the same time *remaining himself in possession* of every thing conveyed by the deed, and having in fact nothing of value, but what was comprised therein,—he was held to have committed an act of bankruptcy.²

So, where a trader, finding he could not stand his ground, assigned to one of his creditors *every thing he had in the world*, to secure an unliquidated debt, *keeping possession* of the property, and giving a letter of attorney to his *own clerk* to collect in the debts,—the court, after observing that the deed was made to *prefer* the assignee to the trader's other creditors, and that his own clerk was invested with the management of his effects, instead of the commissioners, decided that he became a bankrupt the moment he executed the deed.³ And the same point was ruled, where a trader executed a bill of sale of *all* his effects to a creditor, though he was put into possession of them the next day.⁴ Neither

¹ *Stewart v. Moody*, 1 Cr. M. & R. 777. *Tiebert v. Spooner*, Mees. & W. 714.

² *Worsley v. De Mattos*, 1 Burr. 467.

³ *Wilson v. Day*, 2 Burr. 827.

⁴ *Butcher v. Easto*, Doug. 295.

does it render such an instrument less an act of bankruptcy, that it is given by the trader, when under arrest at the suit of the very creditor, to whom it is so made or given.¹ Nor, though the creditors, (with whom such deed was in the first instance concerted,) afterwards, and when it is executed, change their purpose, unknown to the bankrupt, and procure a fiat to be issued against him, founded on the very deed as the act of bankruptcy.² But a conveyance by a trader of all his effects at a given place is not an act of bankruptcy, unless it be shown that he has no other property.³

It makes no difference, however, whether the assignment is made to secure a present debt, or to *indemnify a surety* who is only likely to become a creditor; for the mischief arising to the bankrupt's other creditors from the undue preference, is precisely the same. As where the bankrupt had borrowed of a creditor a sum of money, for the payment of which the defendant became surety in a bond, and the bankrupt conveyed to the defendant *all* his estate and effects, and stock in trade, and a *nominal possession* was given by delivery of a silver spoon,—there being a proviso in the deed, that until the defendant was damnified, he should not take actual possession—this was decided to be an act of bankruptcy, though the bankrupt continued solvent for three years after the conveyance, on the ground, that it was intended to give an *undue preference* to the surety, when he became a creditor, and that the conveyance, being of all his stock in trade, destroyed in reality his capacity of trading; for he could not afterwards fairly sell an ounce of merchandize, the whole belonging to another person.⁴ And an exclusion of only *one* creditor from the benefit of such an assignment, will not prevent its being considered less an act of bankruptcy, than if such creditor had been preferred to the rest; neither will a colourable exception in the deed of an inconsiderable part of the trader's property, prevent its being so considered—as where a trader made an assignment of the bulk of his property (except his household goods and some other articles,) to trustees, in trust to pay themselves and all the creditors mentioned in a schedule, in which schedule one creditor was purposely omitted,—Lord Hardwicke was clear that the assignment was an act of bankruptcy.⁵

So, where an innkeeper assigned all the furniture and other

¹ *Newton v. Chantler*, 7 East, 138.

² *Tappenden v. Burgess*, 4 East, 320. But no creditor who was a party to the deed could himself set it up as an act of bankruptcy. See post, p. 67.

³ *Chase v. Goble*, 2 Man. & G. 92.

⁴ *Scott*, N. R. 245.

⁵ *Hassells v. Simpson*, Doug. 89:

1 Brown, 99.

⁶ *Ex parte Foord*, cit. 1 Burr. 477.

effects at the inn (except his stock in trade, money, and book debts) to a creditor, in trust to sell and pay himself, returning the surplus to the innkeeper; this was held to amount to an act of bankruptcy,—the party being insolvent at the time of the assignment,—as it disabled him from carrying on his business.¹

The above cases, we perceive, relate to assignments for the benefit of *one or more* creditors, to the *exclusion* of others; and, as the necessary consequence of such a transaction is to give an *undue preference*, it seems but just and reasonable that an assignment of this nature should be held fraudulent, as against those creditors who are excluded from the benefit of it. The following decisions, however, invalidate assignments for the *benefit of all* the creditors, the justice of which it is not so easy to comprehend²; though the professed principle on which they proceed is, that the insolvent's property may be more effectually administered for the good of the creditors under the provisions of the bankrupt law, than under the management of trustees privately selected for that purpose by the party himself.³

And here it may be as well to notice an important restriction which is added by the 6 G. 4, c. 16, to this act of bankruptcy. By the 4th section it is provided, that, where the conveyance is by deed to trustees for the benefit of *all* the creditors, it shall not be deemed an act of bankruptcy, unless a commission issue within six calendar months from the execution of it; provided the deed is executed by every trustee within fifteen days after the execution of it by the trader, and the execution, both by the trader and the trustees, be attested by an attorney or solicitor—and notice be given, within two months after the execution, by the trader, if he reside in London or within forty miles thereof, in the London Gazette, and in two London daily newspapers,—and if he reside beyond that distance, then in the Gazette, and one London daily newspaper, and one provincial newspaper published near to the trader's residence; which notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor. This clause removed several difficulties previously connected with trust deeds for the benefit of

¹ *Porter v. Walker*, 1 Man. & G. 686. It seems also that such an assignment would be an act of bankruptcy as a fraudulent preference.

² 14 Ves. 148, 17 Ves. 198.

³ See some forcible observations

upon this subject, by Sir W. D. Evans, in his letter to Sir S. Romilly, page 173. And see the new statute of 7 & 8 Vict. c. 70, for facilitating arrangements between debtors and creditors.

creditors, which could be avoided formerly at any time, as an act of bankruptcy, by an outstanding creditor not a party to the deed. Under such a deed, therefore, no purchaser was ever safe; for he could never be sure that *all* the insolvent's creditors had executed the deed.

An assignment of a trader's effects, however, for the benefit of *all* his creditors, will only be an act of bankruptcy, when they do not *all assent* to the deed; for no creditor, who is either a party or privy¹ to the assignment, or has taken any benefit,² or even acted under it,³ can afterwards set it up as an act of bankruptcy. It has been held, that this estoppel only applied to such party, as *petitioning creditor*, and not to one who happened to be elected an assignee under the commission.⁴ But it has been since decided, that an assignee cannot set up such a deed as an act of bankruptcy, if the petitioning creditor is a party to it.⁵ It is not, however, because the name of a creditor is inserted as one of the trustees in a trust deed, that the firm (of which he is a partner) cannot sue out a fiat as petitioning creditors, and set up the deed as an act of bankruptcy, if the deed was not executed by himself, nor by any member of the firm.⁶ Nor is a party, who gives his assent to such a deed, estopped from suing out a fiat, if he finds that the deed contains a stipulation in favour of a particular creditor.⁷

The first case, involving the consideration of an assignment for the benefit of *all* the creditors, was decided by Lord Mansfield, in which he held, that such an assignment made by a trader to two of his creditors in trust for themselves and the rest, was an act of bankruptcy, unless *every* creditor had concurred⁸; and, in conformity with this decision, it was afterwards held, that where several partners by deed assigned *all* their partnership effects, &c. to trustees for the benefit of

¹ *Bamford v. Baron*, 2 T. R. 594, n. *Ex parte Whalley*, 1 P. Smith, 118. *Ex parte Crawford*, 1 Christ. B. L. 137, 182. *Hicks v. Burfill*, *Ibid.* 235, n. *Ex parte Shaw*, 1 Mad. 598, 1 G. & J. 84. *Ex parte Kilner*, Buck. 104. *Ex parte Battier*, *Ibid.* 426. *R. v. Cook*, 4 Dea. 82. *Ex parte Bunn*, 3 Dea. 119. But a party is not prevented from suing out a fiat upon a *different act of bankruptcy* committed by the trader previously to, and entirely independent of the deed. *Doe v. Anderson*, 1 Star. 262.

² *Ex parte Tealdi*, 1 M. D. & D. 210.

³ *Ex parte Cawkwell*, 1 Rose, 313. *Back v. Gooch*, 4 Camp. 232, 1 Holt, 13.

⁴ *Tappenden v. Burgess*, 4 East, 230. *Jackson v. Irwin*, 2 Camp. 49.

⁵ *Tope v. Hockin*, 7 B. & C. 101. And see *Small v. Marwood*, 9 B. & C. 300.

⁶ *Re Wood*, 3 Dea. 514.

⁷ *Ex parte Marshall*, 1 M. D. & D. 575.

⁸ *Kettle v. Hammond*, 1 C. B. L. 89; and see *Harman v. Fisher*, Per Lord Mansfield, Cowp. 123.

their creditors, and some of the *separate* creditors of one of the partners did not assent to it, the assignment, as to such partner, was an act of bankruptcy.¹ And a condition inserted in such a deed, that it shall be void, if the parties think fit², or if a fiat in bankruptcy be taken out, or if all the creditors do not sign within a given period³—will not make it less an act of bankruptcy; nor, though the assignment is made merely for the purpose of constituting an act of bankruptcy.⁴ Where such an assignment, however, purports to be made by several partners, and one of them never executes the deed—it was considered very doubtful, (unless the deed was expressly meant to be a several deed,) whether in such a case, the assignment would be an act of bankruptcy, even against the partner who executed it; for he might not intend to give the deed any effect, unless the other partner also devoted his share of the partnership property for the purposes of the assignment—which he did not do, in fact, if he failed to execute the deed.⁵ But it has lately been decided, that, in the absence of any thing to show that the deed was delivered as an escrow, it amounts to an act of bankruptcy by the partner who so enacted it.⁶ An assignment of a trader's effects, which is not drawn according to the instructions given to his attorney to prepare it, cannot be set up as an act of bankruptcy; for it is not *his deed*, when it is drawn up contrary to his intention.⁷

In one case it was held, that an assignment made by a trader in India of *all* his effects in trust for creditors, was not an act of bankruptcy, and that such an assignment was not fraudulent and void in itself.⁸ This case, upon the first view of it, seems somewhat irreconcilable with many of the decisions above mentioned; but the ground, on which the court decided that the deed was not an act of bankruptcy, was, that it was executed in India, and therefore could not be considered as an act of bankruptcy in England; a reason which, of course, would not now apply. It has been decided however, within these few years, by the court of King's Bench, that the assignment of the whole of a trader's property is not, of itself, an act of bankruptcy, unless some fact is shown, from which fraud can be inferred, notwithstanding such an assignment would wholly incapacitate the trader

¹ *Eckhardt v. Wilson*, 8 T. R. 140.

² *Tappenden v. Burgess*, 4 East, 230.

³ *Dutton v. Morrison*, 1 Rose, 213. 17 Ves. 199.

⁴ *Simpson v. Sikes*, 6 M. & S. 295.

⁵ *Ibid.* 215. Per Lord Eldon.

⁶ *Boucher v. Burdekin*, 11 Mees. & W. 128.

⁷ *Ex parte Norris*, 1 G. & J. 233.

⁸ *Inglis v. Grant*, 5 T. R. 530.

from carrying on his business.¹ And in a subsequent case it was held, that such an assignment was not an act of bankruptcy, although it was even made by the party with intent to abscond from his creditors, and carry off the purchase money; on the ground that the purchaser paid a fair price for the goods, and was ignorant of the trader's design.² But it is difficult to comprehend the principle on which this last decision can be supported, consistently with that which governs most of the former cases on this subject, and with the obvious meaning of the Act of Parliament. The "fraudulent grant or conveyance" contemplated by the statute is one which is made by a trader, "with intent to defeat or delay his creditors; it does not require that each party to the transaction should be implicated in the fraud. The deed may be valid, as between the trader and the other party to it, or even valid as between that party and the trader's creditors, —but fraudulent as between the trader and his creditors, by reason of its being made by him on purpose to defraud them; and how an assignment of all a trader's property, made by him with the express intention to abscond from his creditors, and carry off the purchase money, can be held to be not a "fraudulent grant or conveyance" made by the trader "with intent to defeat or delay his creditors," it is certainly not very easy to understand.

Secondly—Where a trader assigns, or conveys, only *part* of his property.

Some few of the older cases seem rather opposed to the doctrine, that an assignment of only *part* of a trader's effects amounted to an act of bankruptcy³; but they have been completely overruled by subsequent decisions, all of which lay down on this subject one uniform rule, namely, that a conveyance, either of *all*, or *part*, of an insolvent's property in favour of fewer than all the creditors, is an act of bankruptcy, because it is the means whereby creditors *may be* defeated or delayed. But an assignment of part of the effects is only considered fraudulent, when made in *contemplation of bankruptcy*; or where property to such an extent is conveyed, as will prevent him from continuing his business, and necessarily render him insolvent⁴; for a *solvent* trader has a right to make over any portion of his property that

¹ *Rose v. Haycock*, 1 Ad. & E. 460, n.

² *Baxter v. Pritchard*, 1 Ad. & E. 456.

³ *Small v. Oudley*, 2 P. Wm. 427.

Hooper v. Smith, 1 Bl. 441. *Cock v. Goodfellow*, 10 Mod. 489.

⁴ *Wedge v. Newton*, 4 B. & Adol. 831.

he chooses, either in satisfaction of a debt, or for any other purpose.¹ It is only, therefore, when his circumstances are such as must render him unable to pay all his creditors their demands in full, that an assignment of *part* of his effects to any one creditor can be considered, with *intent* to give that creditor an *undue preference* over the rest; and as this is contrary to the whole spirit and meaning of the bankrupt law, it is now held, not only void as against the other creditors, but also an act of bankruptcy in itself.

Therefore, where a trader, being in insolvent circumstances, borrowed 120*l.* of his brother, and in consideration of this loan assigned to him one-third part of all his effects, and absconded two days after the assignment—though the brother took immediate possession of the goods, and exercised clear acts of ownership by exposing them to sale, and carrying on the trade, and had not the least knowledge of the insolvency—the court, notwithstanding they acknowledged it to be a hard case upon the brother, decided that the deed, by reason of the *preference*, was fraudulent and void; and added, that if they were to let such a deed stand, they should tear up the whole bankrupt laws by the roots.² So, where a trader, being pressed by a creditor for payment, conveyed estates in trust to sell and pay the creditor, with a further trust to pay debts to certain relatives—this was considered an *undue preference* of those relatives, and, as such, an act of bankruptcy.³ So, where a man, after agreeing to have a commission of bankruptcy sued out against him, and who could only pay 8*s.* in the pound, assigned a lease to three of his creditors, to secure the payment of money due to them, and then in trust for himself—the assignment was held fraudulent and an act of bankruptcy, because done in immediate contemplation of becoming a bankrupt.⁴ So, also, where a banker, being *insolvent*, conveyed part of his real and personal estate to his son, who had in fact entered into engagements for and advanced money to his father in amount more than the value of the estates, and who took possession of the property immediately on the execution of the deed,—Lord Mansfield laid it down as clear law, that if, in contemplation of bankruptcy, a man conveyed to the fairest creditor that ever existed,—though the deed would not be fraudulent as *between them*—yet, as it tended to defeat the bankrupt law, by giving a *preference* to one creditor, it was fraud upon the rest, and,

¹ *Jacob v. Shepherd*, 1 Burr. 478.

² *Morgan v. Horseman*, 3 Taunt.

³ *Linton v. Bartlet*, 3 Wils. 47; 241.

and see *Cowp.* 124.

⁴ *Devon v. Watts*, Doug. 85.

consequently, an act of bankruptcy.¹ And even where a trader continued to carry on his trade for three years after the execution of a conveyance of *part* of his property in favour of particular creditors, and the conveyance itself remained in the possession of the bankrupt,—it was held to be a question for a jury to consider, whether such a conveyance was not fraudulent, as being voluntarily made, and in order to give an *undue preference* to the prejudice of the general creditors.²

A conveyance *voluntarily* made means a conveyance made, without such valuable consideration as is sufficient to induce a party acting really, and *bonâ fide*, under the influence of such consideration, or a conveyance made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it.³

It was discussed in one case,⁴ whether a settlement, made by a trader previous to and in contemplation of marriage, was fraudulent against creditors; but there is no express determination on the subject; though, if the wife was clearly proved to be a party to any intent to defeat or delay the creditors, such a settlement would then of course be considered fraudulent as to the wife, and an act of bankruptcy on the part of the husband.⁵

But, though an assignment of any *part* of a trader's effects will be fraudulent, if made in contemplation of bankruptcy, and with a view to prefer one creditor to another, yet if made *bonâ fide* for a just debt, and without contemplating that event—it will then neither be void, nor an act of bankruptcy. As where a merchant, *several months before* his bankruptcy, assigned specific goods in the hands of his factors to a particular creditor, in trust for himself and certain other creditors; and the trusts of the deed were immediately and openly carried into execution;—this assignment was held to be no act of bankruptcy.⁶ So, the assignment of several debts mentioned in a schedule annexed to the assignment, to indemnify the sureties of the assignor, was held good,—he not becoming a bankrupt till a month afterwards, and not having his bankruptcy in contemplation at the time of the assignment.⁷ So

¹ *Round v. Hope Byde*, 1 C. B. L. 94. *Whitwell v. Thompson*, 1 Esp. 68.

² *Pulling v. Tucker*, 4 B. & A. 382.

³ *Arnell v. Bean*, 8 Bing. 91, per Tindal, C. J.

⁴ *Campion v. Catton*, 17 Ves. 268.

⁵ *Ex parte Rutherford*, cit. 17 Ves. 268. *Ex parte Mayor*, Mont. Rep. 292.

⁶ *Jacob v. Shepherd*, 1 Burr. 478. *S. P. Cattell v. Corral*, 4 Young & C. 228.

⁷ *Unwin v. Oliver*, 1 Burr. 481.

where a joint-trader assigned all his separate property (after a previous deed of composition entered into by himself and his partner with their creditors) in trust to pay the balance of the debts due to the joint creditors, and it appeared that, at the time of the execution of the deed, his partner and himself entertained hopes of retrieving themselves; this was held not to constitute an act of bankruptcy.¹

And though, as we have seen, the fact of *remaining in possession* of the property after the assignment is executed, is, *primâ facie*, evidence of fraud,²—yet, when such possession is given to the creditor as the nature of the case will admit, that will remove all fraudulent imputation. For in many cases—as where goods are bulky, or in a place of distant deposit—there cannot be an actual transmutation from hand to hand; and a delivery of a symbol of ownership will then be sufficient. Thus, where an engineer was employed by a canal company to build locks and bridges, and purchased timber and other materials for that purpose (with money advanced him by the company) which were laid on the banks of the canal; and on the company advancing him more money to pay some of his debts, he executed a *bill of sale* to them of such timber and materials, and delivered to them a copper halfpenny as a symbol of transfer,—it was held, that the *bill of sale* was not an act of bankruptcy, it being in reality intended for the benefit of his other creditors,—as it was given by him in consideration of an advance of money made for the purpose of enabling him to pay them, and carry on his business.³ So, where a trader conveyed freehold property to trustees, in trust to sell and dispose of the proceeds as he should direct, for the purpose of raising money, in order that he might meet all demands upon him with greater facility,—such a conveyance was held not fraudulent, as there was *no contemplation* of bankruptcy at the time, and *no preference* or exclusion of any particular creditor; and it was considered to be only disposing of an inconvenient property, the better to apply it to the purposes of his business, which would be for the benefit, and not to the prejudice, of his creditors.⁴ And even where a trader *was insolvent* at the time of such a conveyance, it was held to be no act of bankruptcy, where *no fraud* was imputed, and there was no

¹ *Abbott v. Burbage*, 2 Bing. N.C. 444. 2 Scott, 656.

² And see post, "Reputed Ownership."

³ *Manton v. Moore*, 7 T. R. 67.

⁴ *Berney v. Darison*, 1 B. & B. 408. 4 Moore, 126. *Ibid.* 322. *Robinson v. Carrington*. 1 M. & A. 1. *Greenwood v. Churchill*, 1 Myl. & K. 546.

design to put the property in a train of distribution different from that of the bankrupt law.¹ In like manner, where a trader, being indebted to his bankers in a sum of £13,147, assigned to them his leasehold property, with all his stock-in-trade and effects upon the same, in order to secure the money due and thereafter to become due, and he being at liberty to remain in possession until default made in payment; and, at the time of executing the assignment, he was possessed of other property worth £13,000; it was held that the assignment was good, and did not amount to an act of bankruptcy.² And, in one case, where a trader, being indebted on bond to the trustees of his son's marriage settlement, assigned (at his son's request) a house and furniture to the trustees, as a security for the bond debt; this was held not to be a fraudulent conveyance with intent to defeat his creditors, notwithstanding he was in some pecuniary difficulties at the time of the assignment, and became bankrupt six months afterwards.³ Whether an assignment of any part of a trader's effects is, or is not, an act of bankruptcy, is a proper question for a jury, who are to say, whether it was voluntary, and made in contemplation of bankruptcy.⁴

The grant or conveyance intended by the statute is a grant or conveyance *by* a trader of his *own* property, and not of property conveyed by another person *to, or in trust for him*. Therefore, where a trader is a party to a fraudulent assignment, and expects to derive benefit from it as *assignee*—though it is an act of bankruptcy in the assignor, and also void as to the assignee—yet it is not, in regard to the latter, an act of bankruptcy. As, where A. and B., being partners, and insolvent, A. assigned certain property to B., in trust for the wife of B., who was A.'s daughter,—it was held to be no act of bankruptcy by B., notwithstanding he was a party to the deed.⁵

Where the grant or conveyance, relied on as the act of bankruptcy, *cannot* be produced before the commissioner, he may receive *parol evidence* of its contents;⁶ and if the party, in whose possession the deed is, refuses to produce it, he has now, by the 6 Geo. 4, c. 16, s. 34, authority to commit him for such refusal.⁷

¹ *Berney v. Pyner*, 1 B. & B. 482.

² *Carr v. Burdiss*, 1 Cr. M. & R. 443, 782. 5 Tyrr. 136.

³ *Gibbins v. Phillips*, 7 B. & C. 529. *Abbott v. Burbage*, 2 Bing. N. C. 444. 2 Scott, 656.

⁴ *Bannatyne v. Leader*, 10 Sim.

350.

⁵ *Whitmell v. Thompson*, 1 Esp. 68.

⁶ *Ex parte Cawkwell*, 19 Ves. 234.

⁷ *Ex parte Treacher*, Buck. 17.

12. *Making, or causing to be made, any fraudulent surrender of any of his copyhold lands or tenements.*] This was a new act of bankruptcy created by the 6 G. 4, c. 16, s. 3, and was very properly introduced into it, to remedy an inconvenience in the construction of the former bankrupt laws,—under which it was held, that, as no process of execution could issue to levy a debt upon a *copyhold* estate, a *surrender of copyhold* property, therefore, however fraudulent, was not an act of bankruptcy,—since it could not be said to defeat or delay creditors, who had no means at law of touching that description of property.¹ The same rules of construction, as to the *fraud* of the transaction, and the *intent*, will of course apply to this, as to the two preceding acts of bankruptcy.

13. *Making, or causing to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels.*] This was also a new act of bankruptcy created by the 6 G. 4, c. 16, and removed a great inconsistency that formerly prevailed in the bankrupt law. For, though a fraudulent gift or transfer *by deed* was held an act of bankruptcy, it was decided, that a sale, or any transfer of goods, *not by deed*—however fraudulent the scheme might be in preference of one creditor to another, and as such void—was nevertheless not an act of bankruptcy.² The rules of construction, referred to under the last head, will likewise equally apply to this.

The *gift, delivery, or transfer* intended by the statute, is one that is either fraudulent at *common law*—or fraudulent, as being made in *contemplation of bankruptcy*; and, as every transfer of this latter description amounts to a *fraudulent preference*, the reader is referred to a subsequent part of this work for the law on that subject, where all the decisions are collected.³ The delivery, however, need not amount to a fraudulent preference of a creditor; for a delivery of goods to one, to whom no debt is due, is equally a fraud against the creditors, and constitutes an act of bankruptcy.⁴ So, a sale of goods at such a price, and under such circumstances that the buyer ought to know the trader is selling to raise money in fraud of his creditors, is an act of bankruptcy.⁵ But where goods were sold by an agent of

¹ Ex parte *Cockshott*, 3 Bro. 502.
1 C. B. L. 162.

² *Martin v. Pentress*, 4 Burr.
2478. Doug. 87.

³ See post, "Assignment," part 2,
sect 6.

⁴ *Scott v. Thomas*, 6 C. & P. 611.

⁵ *Cook v. Caldcott*, 1 Mood. & M.
522.

the bankrupt, in contemplation of bankruptcy, for the purpose of raising money for the agent and the bankrupt, but the buyer did not know the sale to be fraudulent, this sale was held not to be an act of bankruptcy.¹ Any assignment or transfer of property by an insolvent trader to any of his children (except upon their marriage), or to any other person, within the terms of the 6 Geo. 4, c. 16, s. 3, will fall, it is apprehended, under this act of bankruptcy.

A bill of exchange is a chattel, within the meaning of the above section; a fraudulent delivery or transfer of such bill, therefore, amounts to an act of bankruptcy.² So, a warrant of attorney, given to a particular creditor by one who intends to take the benefit of the Insolvent Act, has been held to be a fraudulent *transfer* of property.³

The above are all the acts of bankruptcy, where the *intent* of the party is a main and principal ingredient in the composition of the act; the remainder are perfectly independent of any such intention, being deemed of *themselves* sufficiently indicative of his insolvency, so as to render him a fit subject for a fiat in bankruptcy.

14. *Lying in prison.*] *Having been arrested, or committed to prison for debt, or on any attachment for non-payment of money, and thereupon, or upon any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lying in prison for twenty-one days; or having been arrested or committed to prison for any other cause, and afterwards lying in prison for twenty-one days, after any detainer for debt lodged against him and not discharged.*—This act of bankruptcy has nearly become obsolete, as to arrests for debt in meane process.

The *period* of lying in prison is considerably shorter than that required by the former bankrupt law, which was first six,⁴ and afterwards reduced to two⁵ months.

It has been held that the *arrest*, in order to become the date from which the imprisonment is reckoned, must be in all respects a *lawful* arrest. An arrest, therefore, which in its *inception* was strictly *unlawful*, and which only became lawful by subsequent relation, is not such an arrest as is

¹ *Harwood v. Bartlett*, 6 Bing. N. C. 61.

² *Sharpe v. Thomas*, Bing. 416.

⁴ 1 Jac. 1, c. 15.

³ *Cumming v. Bailey*, 4 Moore & P. 36.

⁵ 21 Jac. 1, c. 19.

required by the act. Thus, though an executor might before probate arrest a debtor to the estate, and was justified in so doing if he afterwards proved the will, and took out letters of administration,¹—yet, if the defendant, on such an arrest, continued in prison the whole twenty-one days mentioned in the statute, this was held to be not an act of bankruptcy; for, though the arrest became good, as between the parties, by the relation of the subsequent grant of probate, yet, being bad in law before such grant, it was not allowed to prejudice third persons who were no parties to the suit.² And the bankruptcy of such a defendant (even if he remained in prison a sufficient time after probate to be made a bankrupt) was held not to relate back to the first arrest, so as to defeat a subsequent payment made by him before probate to another creditor for a just debt.³

The *arrest* must also be for a *debt legally due* and demandable. Therefore an arrest on a bond *before the day of payment*, in order to oblige the debtor to find sureties according to the custom of London, was held not a sufficient arrest, within the meaning of the statute; for *no debt was due* at the time of such an arrest.⁴ Neither was an arrest in an action at law on a contract—the only remedy to enforce the performance of which was by a *bill inequity*—a sufficient arrest on which this act of bankruptcy could be supported.⁵ But any arrest or attachment for non-payment of money is now, we perceive, made sufficient by the statute. And a detention in prison for a *penalty due to the crown* is also considered a lying in prison for debt, within the meaning of the statute.⁶

The presumption of insolvency under this act of bankruptcy arises from a party lying in prison twenty-one days, without being able to get bail; and this presumption was not rebutted by mere *formal bail* being put in, for the purpose of changing from one custody to another. Therefore, a man arrested in Kent, and brought up to London to be bailed, and immediately turned over to the King's Bench prison, was held a bankrupt from the time of the first arrest.⁷ Where a defendant, however, put in good and sufficient bail to the action, and afterwards rendered himself to prison in discharge of his bail, it was a doubtful point under the old law whether

¹ Roll. Abr. 917.

² *Duncomb v. Walter*, 3 Lev. 57.

¹ Ventr. 270. T. Raymd. 499.

Skin, 22, 87.

³ 3 Lev. 57.

⁴ Green, 64. Billing, 96. Good,

26. 1 C. B. L. 94.

⁵ *Ex parte Hylkard*, 1 Atk. 147.

2 Ves. 487.

⁶ *Cobb v. Symonds*, 5 B. & A. 516.

⁷ *Rose v. Green*, 1 Burr. 437.

the bankruptcy would relate back to the time of the first arrest, or only to the time of the surrender¹; though Lord Mansfield thought, when bail was really put in, that the bankruptcy only related to the time of the surrender.² The former statute indeed, 21 Jac. 1, c. 19, s. 2, expressly declared, that in the case of *lying in prison* for debt, the defendant should be "accounted a bankrupt from the time of his first arrest." But the 6 Geo. 4, c. 16, s. 5, says nothing about the *time from which* the imprisonment is to be computed;³ and therefore it is apprehended, that, whether a man gives bail or not, he must now in all cases *actually remain in prison* for the space of twenty-one days, in order to be found a bankrupt. It was at first made a question in the construction of the statute—whether, after the expiration of the twenty-one days, the bankruptcy *related back* to the first day of imprisonment, or merely to the day when the twenty-one days expired.⁴ But it is now decided, that the bankruptcy only relates back to the end of the twenty-one days.⁵ No fiat can be sued out upon this act of bankruptcy till the twenty-one days completely expire; for no subsequent lying in prison will give effect to a previous fiat.⁶ But it is no objection, that the requisite time has not expired when the docket is struck.⁷

Where a party, in prison at the suit of one plaintiff, is detained at the suit of another, and after such detention, lies the requisite time at the suit of the second, though discharged as to the first,—this is, of course, within the statute.⁸

The word "*prison*" does not necessarily mean the county gaol, or any of the public prisons; but it will be sufficient, if the defendant, after being arrested, continues in *actual custody* the whole of the twenty-one days. Therefore, where a man was so ill in bed, that he could not be removed without endangering his life, and was allowed by the officer who arrested him to remain for some time in his own house, and was

¹ *Cane v. Coleman*, 1 Salk. 109.
Smith v. Stracy, *Ibid.* 110. *Hill v. Shish*, 2 Show. 512. Bull. N. P. 38.
Tribe v. Webber, *cit.* 1 Burr. 438.

² 1 Burr. 439.

³ This appears to be an accidental omission; for in mentioning the next act of bankruptcy, viz. "escaping from prison," the statute expressly declares, that the commission of that act of bankruptcy shall be deemed to be "from the time of the arrest, commitment, or detention."

⁴ *Tucker v. Barrow*, 1 M. & M. 137.

⁵ *Moser v. Newman*, 6 Bing. 556. *Higgins v. M'Adam*, 3 Youg. & J. 1.

⁶ *Gordon v. Wilkinson*, 8 T. R. 507.

⁷ *Wydown's case*, 14 Ves. 30. *Ex parte Dufrene*, 1 V. & B. 51. 1 Rose, 333.

⁸ *Coppendale v. Bridgen*, 2 Burr. 814.

afterwards carried to gaol, where he remained till the expiration of the full time from the date of his first arrest,—this was held a sufficient lying in prison to constitute an act of bankruptcy.¹ And, though the party had the benefit of the *day rules* of the prison, it was accounted equally an act of bankruptcy; for the principle on which *this* act of bankruptcy is founded is, that it is evidence of insolvency.² If a defendant, however, on being arrested, is allowed to *go at large*, and then returns to custody, the act of bankruptcy has, in that case, only reference to the latter event; for the period of imprisonment required by the statute must be *continuous and unbroken*.³

There was some doubt entertained formerly, whether, when a trader was committed to prison on a *criminal charge*, and was afterwards charged in an action for debt, his lying in prison the stated time after such detainer constituted an act of bankruptcy,—the original commitment being under a criminal sentence.⁴ But it was afterwards determined, that such lying in prison amounted to an act of bankruptcy; and this, though he might be discharged from the criminal process without his knowledge.⁵ The words, however, of the 6 Geo. 4, c. 16, s. 5, remove all doubt upon this point, as it is immaterial whether he is in the first instance committed to prison for debt, or “for any other cause.”

In the computation of the period of imprisonment, the day of being committed to prison, or of the arrest—if the party thereupon goes to prison⁶—is to be reckoned the first of the twenty-one days; and the time is not completed until the expiration of the whole of the last day.⁷

15. *Escaping out of prison, or custody, after having been arrested, COMMITTED⁸, or DETAINED⁸ for debt.*] This act of bankruptcy is founded on the same principle as the last; for no man would break prison, that was able and desirous to procure bail. The observations therefore under the last head of bankruptcy, as to the *legality of the arrest*, apply in an equal degree to this; and unless the *arrest, committal, or detainer*, is strictly lawful in every respect, the subsequent escape will not be an act of bankruptcy. By the former

¹ *Stevens v. Jackson*, 1 Marsh, 469. 6 Taunt. 106.

² *Soames v. Watts*, 1 Carringt. N. P. Rep. 401.

³ *Barnard v. Palmer*, 1 Camp. 309.

⁴ *Ex parte Bowes*, 4 Ves. 168.

⁵ *Rex v. Page*, 1 B. & B. 308. 3 Moore, 656. 7 Price, 616.

⁶ *Saunderson v. Gregg*, 3 Star. 72.

⁷ *Glassington v. Rawlins*, 3 East, 407.

⁸ These words were first introduced in the 6 Geo. 4, c. 16, s. 5.

statute (the 21 Jac. 1. c. 19) the *arrest* must have been for not less than the sum of 100*l.*; but the 6 G. 4, c. 16, s. 5, comprehends every arrest for debt, whatever the *amount* of the debt may be for which the trader is arrested. The *escape* intended by the statute is such an one as plainly evinces the intention of the debtor to run away, and thereby to defeat his creditors; and it must be an escape *against the will* of the officer in whose custody he is, and not an escape by implication; for, this being considered a criminal act in the eye of the law, a man shall not be made a criminal, when he has no intention to commit a crime. Therefore, if a trader is arrested in Kent, and, being brought to town in custody of the sheriff's officer, is permitted by him to call at his attorney's house in the city, and from thence is immediately carried to the judge's chambers, in obedience to a writ of *habeas corpus*—this is not such an escape as is contemplated by the statute; for the defendant remains substantially in custody, notwithstanding he is carried into another county in his transit to the judge's chambers.¹

16. *Filing a declaration of insolvency in the bankrupt office.*²] This act of bankruptcy being re-enacted, with some modification, by the 5 & 6 Vict. c. 122, s. 22, will be considered in the order in which it is placed by that statute.³

17. *Fraudulent composition.*] *Any trader, after a docket struck against him, either paying money, or giving or delivering any satisfaction or security for his debt, or any part thereof, to the person striking the docket against him, whereby such person MAY receive more in the pound in respect of his debt, than the other creditors.*⁴

This act of bankruptcy was first created by the 5 Geo. 2, c. 30, s. 24; but it was there confined to the payment of money, &c., *after the issuing of the commission*, and did not embrace the earlier period included in the 6 Geo. 4, c. 16; viz., *after striking the docket*, upon which latter event the mischief intended to be prevented was generally consequential; for, by striking a docket, the crafty creditor could gain some days to himself, the more easily to traffic with the bankrupt, to the prejudice of the other creditors.⁵ The act of bankruptcy was also not complete under the former statute, unless the creditor had ACTUALLY and PRIVATELY received more in the pound than the other creditors. In the 6 Geo. 4,

¹ *Rose v. Green*, 1 Burr. 440.

⁴ 6 Geo. 4, c. 16, s. 8.

² See 6 Geo. 4, c. 16, s. 6.

⁵ *Ex parte Gedge*, 3 Ves. 350.

³ See post.

c. 16, s. 8, the word "*privately*" is omitted; and the *probability*, or even the *possibility*, of the petitioning creditor receiving, under such compact with the bankrupt, more in the pound than the other creditors, will be enough now, without any *actual receipt* of money, to establish this act of bankruptcy. A fiat issuing upon such a docket may, however, be either proceeded in, or superseded, as the lord chancellor shall think fit; in which latter case a new fiat may issue, either upon this or any other act of bankruptcy. The petitioning creditor, as a penalty for such compounding, forfeits his whole debt; and may also be compelled to repay or deliver up the money or security he has received, or the full value thereof, to such person as the commissioner shall appoint, for the benefit of the creditors of the bankrupt.¹

18. *Filing a petition to the insolvent court for his discharge from custody, under the 1 & 2 Vict. c. 110.*] By sect. 39 of that statute it is declared that the filing of the petition of every person in actual custody who is subject to the bankrupt law, and who shall apply for his discharge from custody, according to that act, shall be accounted an act of bankruptcy from the time of filing such petition; provided the party be declared bankrupt before the time advertised in the *London Gazette* for the prisoner to be brought up before the insolvent court, or within two calendar months from the time of making the order of that court for vesting the estate of the prisoner in the provisional assignee; in which case the fiat will have the effect of diverting the real and personal estate of the insolvent out of the provisional assignee. The filing of the petition is when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court.²

19. *Not complying with the requisitions of the 5 & 6 Vict. c. 122, s. 13, after being summoned to appear before the court of bankruptcy, on the previous affidavit and demand of a creditor.*] By the 11th section of that statute, if the creditor of any trader shall file an affidavit in the court of bankruptcy of the district in which such debtor shall reside, or in the court of bankruptcy, if the debtor shall not reside in any such district, in the form specified in the schedule to the act, of the truth of his debt, and of the debtor, as he verily believes,

¹ *Ex parte Thompson*, 1 Ves. jun. 157. *Ex parte Paxton*, 15 Ves. 464. *Ex parte Brown*, *Ibid.* 473. *Ex parte Brine*, Buck. 19. 108.

² *Garlick v. Sangster*, 9 Bing. 46. 2 Moore & S. 68.

being such trader, and of the delivery to such trader personally of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, the court may issue a *summons* in writing, calling upon the trader to appear before such court, and stating in the summons the purpose for which the trader is called upon to appear. Where the debt demanded is claimed to be due to a partnership firm, the particulars of demand and notice must be signed by, or in the name of, one of the partners on behalf of himself and partner, adding the style or firm of partnership and place of business; and where the debt is claimed to be due to any one person, or to two or more persons not being partners, the particulars, &c., must be signed by, or in the name of, every person by his christian and surname, and his or their residence or place of business.¹ Where a public company proceed under the act, it must be proved that some person was duly authorised by them to demand the payment of the debt.² The particulars and notice must be directed to the party summoned by his christian and surname,—or when the christian name is not known, then by the initial letter or some contraction of the christian name, and by the surname, and also by his place of residence,—and must contain a statement of the name or names of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership and place of business.³ The account in such particulars of demand must be expressed with reasonable and convenient certainty, as to dates and all other matters. And where credit is given in such account to the debtor, the notice must require payment of the difference or balance, only, which appears to be due on such account.⁴ If the affidavit required by the act is not filed within one calendar month after service of the particulars of demand and notice, the creditor cannot afterwards proceed, without serving new particulars of demand and notice.⁵ The affidavit must be entitled of “The Court of Bankruptcy in London,” or “The Court of Bankruptcy for the—— District,” as the case may be;⁶ and must state the nature of the debt with the same degree of certainty and precision, as is required in an affidavit to hold to bail by order

¹ General rules and orders of 12th Nov., 1842, Rule 20; post, Appendix; and 3 M. D. & D. app. lviii.

² *Ex parte Gratton*, 2 M. D. & D. 401.

³ General rules and orders of 12th Nov., 1842, Rule 21; post, Appendix; and 3 M. D. & D. app. lviii.

⁴ Id. Rule 22.

⁵ Id. Rule 23.

⁶ Id. Rule 24.

of a judge.¹ The affidavit may be sworn before a master extraordinary in chancery, and filed in the office of the registrar of the court of bankruptcy, or of the registrar of the district court, as the case may be.² Although the notice is withdrawn by the creditor on account of some irregularity, yet, as he is entitled to give a fresh notice, the court will not take the affidavit off the file.³ One partner may make the affidavit, without the others joining in it.⁴ The summons must describe the parties in the same manner as they are described in the particulars of demand and notice, and must be indorsed with a notice to the party summoned in the form specified in the general order.⁵ The summons must also be indorsed with the name and place of residence of the attorney actually suing out the same, and in case he shall not be an attorney of the court of bankruptcy, then also with the name and place of residence of the attorney of such court in whose name the summons shall be sued out; but in case no attorney shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor in person. The summons must be served four days, at least, before the time for appearance therein mentioned, and between nine o'clock in the forenoon and nine in the evening.⁶

By sect. 12, upon the appearance of the party, the court may require him to state whether or not he admits the demand of the creditor, or any and what part thereof, and reduce such admission into writing, which he is required to sign, and which is then to be filed in the court. He may also make a deposition upon oath, in writing, under his hand, to be also filed, that he verily believes he has a good defence to the demand, or to some and what part thereof. If the creditor make default in appearance at the time appointed, the debtor is entitled to his discharge from the summons, and a memorandum of such discharge must be thereon indorsed.⁷ If the debtor appears and refuses to admit the demand, but shall, either as to the whole, or part, make a deposition on oath, in the form required by the act, that he believes he has a good defence to the same, the debtor is also in that case

¹ General rules and orders of 12th Nov., 1842, Rule 25; post, Appendix; and 3 M. D. & D. app. lviii.

² Ex parte *Hall*, 3 Dea. 405.

³ Ex parte *Gibson*, 3 Dea. 531. Ex parte *Cheese*, 3 M. D. & D. 79.

⁴ Ex parte *Rhodes*, 4 Dea. 125.

⁵ General rules and orders of 12th

Nov., 1842, Rules 26, 27 post appendix; and 3 M. D. & D. app. lviii. And see the form of the notice, post, appendix.

⁶ Id. Rules 28, 29, and 30.

⁷ Id. Rule 31; post, appendix; and 3 M. D. & D. Appendix lxii.

entitled to his discharge.¹ Any want of compliance on the part of the plaintiff with the above rules may be waived by the defendant; but, if it is made known to and proved to the satisfaction of the court, at the time required for the defendant's appearance, it is a good objection to requiring the defendant to state whether or not he admits the demand; and in such case, the defendant is likewise entitled to his discharge from the summons.²

By sect. 13, if any such trader so summoned shall not come before the court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court, and allowed); or if, upon his appearance to the summons, or at any enlargement or adjournment thereof, he shall refuse to admit such demand, and shall not make a deposition that he believes he has a good defence to such demand; then, if he shall not within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure or compound for such demand to the satisfaction of the creditor, or enter into a bond, in such sum and with two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with costs,—every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat shall issue against him within two months from the filing of the affidavit. Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand, or for entering into a bond with sureties, must be supported by affidavit.³ And before he can be allowed to enter into the bond, he must give to the plaintiff, or his attorney, a notice in writing signed by himself, or his attorney, of his intention so to proceed; which notice must be accompanied with a true copy of the affidavit of the sureties, as to their sufficiency, in the form specified in the general order;⁴ and the amount of property sworn to must be the sum demanded, fractional parts of a pound excepted, and one-fourth more.⁵ The plaintiff may, within four days after service of notice of sureties, except to them, by delivering a written notice to the defendant or his attorney; and, two days after the service of this notice, the defendant, or his attorney, must attend at

¹ General rules and orders of 12th Nov., 1842, Rule 32; post, appendix; and 3 M. D. & D. appendix lii.

² Id. Rule 33.

³ Id. Rule 34.

⁴ Id. Rules 35, 36.

⁵ Id. Rule 37.

eleven o'clock in the forenoon in open court, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of the bond; when the plaintiff or his attorney may oppose the sureties, upon affidavit, or on the ground of any defect appearing on the face of the proceedings.¹ The bond is to be taken in double the sum demanded, and the condition must be in the form specified in the general order.² Where no notice of exception is served, the defendant, or his attorney, must attend in open court on the sixth day after the service of notice of sureties, at eleven o'clock in the forenoon, with the bond and affidavit of execution of it, and also with an affidavit of the service of notice of sureties, and an office copy of the affidavit of their sufficiency.³ Although the bond is duly executed by the debtor and his sureties within the fourteen days, yet if the approval of the commissioner is not obtained until two days afterwards, it seems that the creditor is justified in suing out a fiat.⁴ A commissioner, who has approved of the security offered by a debtor, is *functus officio*, and cannot revoke his approval.⁵ Where the creditor purposely kept out of the way to avoid receiving the debt within the time limited by the statute, it was held that he could not support a fiat against the debtor.⁶

All affidavits used in court must be filed. Where any number of days is above described for the doing of any act, they are to be reckoned exclusive of the first, and inclusive of the last day, unless the last day shall be a Sunday, Christmas-day, or Good Friday, or a public fast or thanksgiving day, in which case the time is to be reckoned exclusive of that day also.⁷

By sect. 14 of 5 & 6 Vict. c. 122, if any trader so summoned, shall, upon his appearance, sign an admission of the demand, and shall not, within fourteen days next after the filing of such admission, pay, or tender and offer to pay, to the commissioner, the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, he shall also be deemed to have committed an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat issues within two months from the

¹ General rules and orders of 12th Nov., 1832, Rules 38, 39; post, appendix; and see 3 M. D. & D., Appendix lxii.

² Id. Rule 40.

³ Id. Rule 41.

⁴ Ex parte Goody, 1 M. D. & D. 677.

⁵ Ex parte Neale, 2 M. D. & D. 620.

⁶ Ex parte Gratton, 2 M. D. & D. 401.

⁷ General rules and orders of 12th Nov., 1842, Rules 42, 43; post, appendix; and see 3 M. D. & D. Appendix lxii.

filing of the affidavit. Where the creditor, however, is privy to any suspension of the payment of the debt, until after the expiration of the fourteen days, he cannot support a fiat on the ground that the debtor has not paid or secured the debt within the fourteen days.¹ And where a trader had been summoned before a commissioner, under the 11th section of the above act, and, before the proper time had elapsed to constitute an act of bankruptcy within the meaning of the 13th section, a fiat was by mistake issued, which was afterwards annulled; it was held that the existence of this fiat was such an obstruction to the payment of the petitioning creditor's debt, that he could not sue out a new fiat founded on the omission to pay, &c. according to the terms of the 14th section.²

By section 15, if any trader so summoned shall, upon his appearance, sign an admission for part only of such demand, and shall not make a deposition that he believes he has a good defence to the residue; then, if, as to the sum so admitted, he shall not within fourteen days after the filing of such admission pay or secure, or compound for the same, to the satisfaction of the creditor,—and, as to the residue of such demand, shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him, pay, secure, or compound for the same, to the satisfaction of the creditor, or enter into a bond, in manner before-mentioned, for payment of the sum to be recovered in any action, together with the costs; every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of the summons, provided a fiat issues within two months from the filing of the affidavit.

By section 16, if any trader so summoned shall, upon his appearance, refuse to sign the admission before required, whatever may be the nature of his statement, or whether he makes any statement, or not, he shall be deemed to refuse to admit such demand; but the court may enlarge the time for calling upon him to state whether or not he admits the demand, or any part thereof, and also for entering into the bond. And by section 17, an admission of debt, signed elsewhere than before the court, may be filed, and be of the same force and effect as an admission on his appearance in court, provided there be present some attorney on his behalf, expressly named by him and attending at his request, to inform him of the effect of such admission, before it is signed,

¹ *Ex parte Budd*, 1 M. D. & D. 436.

² *Ex parte Musgrove*, 3 M. D. & D. 386.

and the attorney subscribe his name as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the trader, and state therein that he subscribes as such attorney.

If the proceedings are taken under the above statute by the petitioning creditor, not for the purpose of obtaining the payment of his own debt, but to compel the trader to satisfy the alleged debt of a third person, it seems that a fiat cannot be supported.¹

By section 18, where any trader, against whom an affidavit is filed, shall be summoned to appear before the court, he is to have such costs as the court in its discretion shall think fit. And by section 19, wherever a creditor, in any action against the trader, shall not recover the amount sworn to in his affidavit of debt filed under the provisions of the act, if the affidavit for such amount was made without probable cause, the defendant is entitled to costs.

19. *Not paying, securing, or compounding for a judgment debt, within fourteen days after notice requiring payment.*] By 5 & 6 Vict. c. 122, s. 20, if any plaintiff shall recover judgment in any action for any debt or money-demand against a trader, or shall be in a situation to sue out execution upon such judgment, and there be nothing due from the petitioner by way of set-off, and such trader shall not, within fourteen days after notice in writing, personally served upon him, requiring immediate payment of the debt, pay, secure, or compound for the same to the satisfaction of the petitioner; he is to be deemed to have committed an act of bankruptcy on the fifteenth day after service of the notice. But, if such execution shall be suspended or restrained by any rule of court, no further proceeding shall be had in such notice; but the petitioner, when he shall be in a situation to sue out execution, may proceed again by notice in the manner before directed.

20. *Disobeying the order of a court of equity, &c. for payment of money.*] By section 21 of the above act, if any decree or order be pronounced in any cause in a court of equity, or any order be made in bankruptcy or lunacy against any trader, ordering him to pay any sum of money, and he shall disobey such decree or order, the same having been duly served upon him, the party entitled or interested may apply to the court by which the order was pronounced for a peremptory order; and if the trader, after being personally served with the

¹ *Ex parte Gratton*, 2 M. D. & D. 401.

peremptory order, fourteen days before the day appointed for payment of the money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after the service of such order.

21. *Filing a declaration of insolvency in the bankrupt office.*¹] By section 22, if any trader shall file in the office of the secretary of bankrupts, a declaration in writing, in the form given by the act, and attested by an attorney or solicitor, that he is unable to meet his engagements, he shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat shall issue against him within two months. A copy of such declaration, purporting to be certified by the secretary of bankrupts, or his clerk, as a true copy, is declared to be evidence of such declaration having been filed.

The *date* of a fiat is *prima facie* evidence of the time of its being *issued*, within the meaning of the above section.²

Traders having privilege of parliament.] With respect to *traders having privilege of parliament*, it is enacted by the 9th section of the 6 Geo. 4, c. 16, that, if any such person commit any of the acts of bankruptcy therein before enumerated, a commission of bankrupt might issue against him, and be proceeded with in like manner as against other bankrupts; save only, that he is not liable to be *arrested* or *imprisoned* during the time of his privilege, except in cases by the act made felony. It is also enacted by the 10th section of the statute, that, if any creditor of such a trader, to the amount requisite to support a commission, shall file an affidavit,³ in

¹ The above was first made an act of bankruptcy by the 6 Geo. 4, c. 16, s. 6, and was intended for the relief of the honest, though unfortunate debtor, who might wish to avail himself of the protection afforded by a commission, without having recourse to a concerted act of bankruptcy, which was formerly held to be a nullity. For as bankruptcy was regarded either in the light of criminal insolvency, or as a condition of necessity, no voluntary act of the trader, by which he *constituted himself* a bankrupt, was held admissible in law; as in the one case he would be declaring himself a criminal, and in the other

it would be a spontaneous contrivance of his own, and not a condition of necessity. The courts, therefore, looked upon such voluntary act as nothing less than a fraud. Experience, however, has proved the practical inconvenience of this doctrine, if it has not proved its fallacy.

² *Ex parte Rowe*, 4 Dea. 68.

³ This provision was first introduced by the 4 G. 3, c. 33, and other provisions were added by the 45 G. 3, c. 124, s. 1, before which acts a member of parliament, being privileged from arrest, could not have been *compelled* to become a bankrupt.

any court of record at Westminster, that the debt is justly due to him, and that the debtor is such a trader, and shall sue out of the same court a *summons*, or an *original bill and summons*,—then, if such trader shall not within one calendar month after personal service of such summons, either pay, secure, or compound for the debt to the satisfaction of the creditor, or enter into a bond in such sum, and with two such sufficient sureties, as any of the judges of the court out of which the summons is issued shall approve of, conditioned to pay such sum as shall be recovered in the action, together with the costs, and also cause a proper appearance to be entered to such action; every such trader shall in that case be deemed to have committed an act of bankruptcy from the time of the service of such summons; and any creditor might sue out a commission against him, and proceed thereon as against other bankrupts.

In the proof of this act of bankruptcy, it must appear that the summons was taken out *after* the affidavit of debt was filed. And, as some of the circumstances cannot be proved but through the medium of a creditor, the *necessity* of the case was held to justify a departure, in some measure, from the general rule, that a creditor could not be admitted to prove the act of bankruptcy; receiving however his testimony only as to facts, of which evidence could not be obtained from other sources. Therefore, though the creditor was permitted to prove that the debt had not been paid, secured, or compounded for to his satisfaction,—yet the circumstance of the bankrupt being a member of parliament, and a trader, was only provable by other witnesses.¹ But now, by the provisions of the 6 & 7 Vict. c. 85, a creditor would be competent to prove those facts.²

It is provided also by the 11th section of the 6 Geo. 4, c. 16, that if any *decree, or order*, shall have been pronounced in any cause depending in equity, or any order made in any matter of bankruptcy, or lunacy, against any trader having privilege

¹ *Ex parte Harcourt*, 2 Rose, 211. By 52 Geo. 3, c. 144, s. 1, when members of the House of Commons become bankrupt, they are declared to be incapable of sitting and voting in the House for twelve calendar months, unless within that period the creditors of such member shall be satisfied the full amount of their debts. And by sect. 2, if the commission shall not within twelve calendar months be superseded, nor

the debts satisfied, the commissioners are required to certify the same to the speaker of the House of Commons, and thereupon the election of such member is deemed to be void; and the speaker is required to insert notice thereof in the *Gazette*, and at the end of fourteen days to issue his warrant for a fresh election.

² See post, "Evidence." ch. 19, sect. 6.

of parliament, ordering such trader to pay any sum of money, and he shall disobey, after the same has been duly served upon him, the person entitled to receive such money may apply to the court, by which the same shall have been pronounced, to fix a peremptory day for the payment of such money; and if, upon being personally served with such peremptory order eight days before the day appointed for the payment of the money, he shall neglect to pay the same, he shall then be deemed to have committed an act of bankruptcy from the time of the service of the order; and every such creditor may also sue out a commission against him, and proceed as against other bankrupts.

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CHAPTER IV.

OF THE PETITIONING CREDITOR.

- SECT. 1. *Who may be.*
2. *Of the Amount and Nature of his Debt.*
 3. *Of the Time of the contracting and accruing of the Debt.*
 4. *General Duties and Liabilities of the Petitioning Creditor.*

SECTION I.

Who may be.

By the 7 & 8 Vict. c. 96, s. 41, the lord chancellor may now, upon the petition of the trader himself, issue a fiat against him, provided he files a declaration of insolvency in the manner prescribed by the 6 Geo. 4, c. 16, s. 6, and the 5 & 6 Vict. c. 122, s. 22.¹

It seems that an *uncertificated bankrupt*, as he can acquire property and hold it against all the world except his assignees, may also be a petitioning creditor, provided his assignees make no claim to the debt upon which he sues out a fiat.² But a bankrupt, who has not paid 15s. in the pound under a second fiat, cannot be a petitioning creditor, although he has obtained his certificate; for all his property vested in the assignees under the second fiat.³ And upon the same principle, a party, who has been discharged twice under an insolvent act, and is afterwards bankrupt, without paying 15s. in the pound, cannot be a petitioning creditor.⁴ Where a petitioning creditor became bankrupt, before the fourteen days for opening the fiat had expired, another creditor was permitted to issue a fresh fiat.⁵ The *executor* of a bankrupt cannot sue out a fiat upon a debt due to his testator before his bankruptcy.⁶ A trustee, alone, cannot issue a fiat against the debtor, without joining the *cestui que trust*.⁷

¹ See ante, p. 87

² Ex parte Cartwright, 2 Rose,

230.

³ Ex parte Robinson, 1 Mont. & M. 44.

⁴ Ex parte Massarenas, 1 Dea. & C. 507.

⁵ Ex parte Smith, 3 D. & C. 309.

⁶ Ex parte Goodwin, 1 Atk. 100.

⁷ Ex parte Gray, 4 D. & C. 778.

A married woman, also, is not competent to be a petitioning creditor, although her husband has gone abroad, and she has traded as a separate trader, and has been treated as such by the bankrupt;¹ and, although the debt is due to her in *autre droit*, viz., as executrix, she is equally incompetent, without her husband joining her.²

It seems, that, pending an action of replevin on a distress for rent, the landlord cannot sue out a fiat against the tenant, founded on his demand for rent.³

Although a *public company* have power, by a private act of parliament, to commence "all actions and suits" in the name of their secretary, as the nominal plaintiff, this does not enable the secretary to petition for a fiat against the debtor to the company.⁴

SECTION II.

Of the amount and nature of the Debt.

By 5 & 6 Vict. c. 122, s. 9, the amount of the petitioning creditor's debt⁵ must, in the case of a single creditor, or of two or more persons, being partners, be 50*l.* or upwards;—in the case of two creditors petitioning, 70*l.*,—and of three or more creditors, 100*l.* And though the debt be *not actually payable* at the time of the act of bankruptcy, yet if *credit* has been given to the bankrupt upon valuable consideration, it will be a good petitioning creditor's debt, whether he has any security for it in writing or not.⁶

The debt must be a *legal* debt, and not an *equitable* one;⁷ therefore the *assignee of a bond* (a security which is not assignable at law) cannot be a petitioning creditor.⁸ And where there is only *one* petitioning creditor, there must be a

¹ Re *Atkinson*, 2 Molloy, 451.

² Ex parte *Mogg*, 2 G. & J. 397. *Martin v. Winter*, cit. ibid. 398.

³ *Emery v. Mucklow*, 10 Bing. 401.

⁴ *Guthrie v. Fiske*, 3 B. & C. 178.

⁵ Stat. 151. But see Re *Beale*, 2 Drury & W. 275.

⁶ The statutes prior to the 5 G. 2, c. 20 (with the exception of the 3 Ann. c. 22, which soon expired) did not require the commission to be issued upon the petition of a creditor. And the 5 Ann. c. 22, was the first statute that regulated the amount of the petitioning creditor's debt.

⁶ Under the construction of the former law (the 5 G. 2, c. 30, s. 22), a debt payable at a future day, unless there was a written security for it, would not constitute a good petitioning creditor's debt. *Parslow v. Dearlove*, 4 East, 438. *Hoskins v. Duperoy*, 9 East, 491. Ex parte *White*, 3 Ves. & B. 130. Ex parte *Parenden*, Buck. 35. *Price v. Nixon*, 5 Taunt. 338.

⁷ Ex parte *Hawthorne*, Mont. 132.

⁸ Ex parte *Hylliard*, 2 Ves. 407. 1 Atk. 147. *Medlicott's case*, 2 Str. 899. Ex parte *Lee*, 1 P. Wm. 782.

debt due to him *separately*, and for which he could maintain an action at law in his *own right*. Therefore *one of two joint obligees*, or *one of several partners*, is not by himself a good petitioning creditor against the obligor, or the joint debtor, without the *other* obligee, or partner, concurring in the petition.¹ But *one* of several *assignees* may sue out a fiat in respect of a debt due to their bankrupt, without the *other* assignees joining in the petition,—such appearing to be the practice at the bankrupt office; and it was held in such a case to make no difference, that the assignee petitioning was also the solvent partner of the bankrupt.² And where one of three partners engaged with the acceptor of certain bills of exchange drawn by the partnership, to provide for the acceptances when due,—it was held that the partnership could not support a commission on the bills against the acceptor; for, as they could not maintain an action at law on them against him, (in consequence of the undertaking of one of the partners to provide for them,) they could not make them the subject of a debt as petitioning creditors.³ But a joint debt, due *from* several partners, is a legal debt to support a *separate* fiat by the joint creditor *against any one* of the partners.⁴

As to the reciprocal right of partners against each other in this respect,—one partner cannot sue out a fiat against another, upon any debt arising out of a partnership transaction. But when the accounts have been liquidated, and the partnership determined, and the solvent partner has paid all the debts;—in such a case Lord Eldon thought a commission might be supported.⁵ And where the bankrupt, who had been in partnership with W. P., borrowed various sums of him during that time, by way of personal loan, and upon the dissolution of partnership purchased the stock-in-trade for a stipulated sum; it was held that W. P. had a good petitioning creditor's debt, notwithstanding he had made out an account entitled "Mr. U. P. (the bankrupt) in account with U. and W. P."⁶ But where, on the formation of a partnership between A. and B., A. lent to B. B.'s proportion of the capital; to secure the re-payment of which B. assigned property to C., in trust for A., and covenanted to pay C. the amount; and A., after an act of bankruptcy by

¹ *Brickland* alias *Buckland* v. *Newsame*, 1 Taunt. 479. 1 Camp. 474.

² *Ex parte Blakey*, 1 G. & J. 197.

³ *Richmond* v. *Heapy*, 1 Star. 202.

⁴ *Ex parte Crisp*, 1 Atk. 134.

Crispe v. *Perritt*, Wilkes, 467. *Ex parte Caruthers*. *Ex parte Upton*, cit. *Ibid*. *Ex parte Ackerman*, 14 Ves. 604. *Ex parte Dewdney*, 15 Ves. 499.

⁵ *Ex parte Nokes*, 2 Mont. 144.

⁶ *Ex parte Gray*, 4 D. & C. 778.

B., known to A., filed a bill for a dissolution and an account, and for payment of the debt; it was held, that A. and C. could not, after such election, sue out a fiat against B. founded on that debt,—A. having elected his remedy and treated the debt as mixed up with the partnership accounts.¹ But one partner may always support a fiat against another, if the debt does not arise out of a regular partnership transaction,² in which each partner is interested in *both the profit and the loss*. Therefore, in a case where A. deposited goods with B. for sale, on an agreement that the profits should be equally divided between them, but the *loss*, if any, was to be *borne exclusively by A.*; and B. afterwards effected a sale and received the money; this agreement was held not to render them such partners in the transaction, as to prevent A. from suing out a commission against B., on the balance due from him to A.³

So, where A. lent money to B., to enable him to commence a trade, at five per cent. interest; and after the loan, B. agreed to pay A. one-eighth of the annual profits, by monthly payments, and accordingly made several payments, for which A. gave receipts on account; it was held that the balance of the principal and interest due from B. was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury.⁴ But, if one of two partners gives an acceptance in the name of the firm, for a pre-existing debt of his own, without the authority of the other partner, this acceptance is not a good petitioning creditor's debt, to support a joint fiat against the two partners.⁵ The debt must also be one lawfully contracted; therefore a promissory note given to a creditor for the remainder of his debt by a party who had entered into a composition with his creditors, will not support a subsequent fiat; for it is *nudum pactum*.⁶

A creditor who receives part of his demand, *after notice of an act of bankruptcy*, which reduces his debt *below* the requisite amount, is not thereby precluded from suing out a fiat on the whole debt; for such payment after notice of the act of bankruptcy is invalid in law; and the creditor, moreover, by taking out a fiat on the ground that the *whole* demand is unpaid, admits, of course, the *invalidity* of the payment.⁷ And, upon the same principle, where a cre-

¹ Ex parte Gray, 4 D & C. 778.

² Windham v. Paterson, 1 Star. 144.

³ Marston v. Barber, 1 Gow. 17.

⁴ Ex parte Briggs, 3 D. & C. 367.

⁵ Ex parte Austen, 1 M. D. & D. 247.

⁶ Ex parte Hall, 1 Dea. 171.

⁷ Mann v. Shepherd, 6 T. R. 79. Ex parte Miller, Buck. 283.

ditor, who was ignorant that an act of bankruptcy had been *previously* committed by his debtor, executed a composition deed (which, being after the act of bankruptcy, was therefore invalid) for the amount of his debt; it was held that, though he afterwards received a dividend under it, yet as the whole transaction was invalid, he might nevertheless become a good petitioning creditor in respect of the original debt.¹ But where a composition deed assigned the effects to four trustees, although two only executed the deed, it was held not to be for that reason void, and that the debt of a trustee, who had executed it, was thereby extinguished, and that he could not sue out a commission.² Where, however, a creditor by simple contract took a bond for his debt *after the act of bankruptcy*, it was held not to extinguish the original debt, so as to prevent the creditor from suing out a commission upon it.³ So also, where a creditor took a bill of exchange for part of his debt, drawn by the debtor upon an acceptor, who had not at that time, nor previous to the bill becoming due, *any effects* of the drawer in his hands,—this was held not to prevent the creditor from suing out a commission upon the whole debt, notwithstanding he neglected to give notice to the drawer of the bill being dishonoured.⁴ A *promissory note*, also, given on a *wrong stamp*, for a pre-existing debt, does not destroy the debt; and a fiat may be supported in such case on the original debt; for the note in this case is not the foundation of the debt, nor necessary to be had recourse to in the proof of it, if it can be established by other evidence.⁵

Where a consignee transferred bills of lading to a creditor, as a security for his debt, and the consignor stopped the goods *in transitu*, it was held that the creditor might issue a fiat against the consignee on his original debt.⁶

A creditor, by *notes bought in* at 10s. in the pound, is a creditor for the full sum, and may take out a fiat as a creditor to that amount.⁷ And banker's notes payable on demand, if not sufficient before demand made to constitute a good petitioning creditor's debt, as against the bankers, do not extinguish or diminish any prior debt that may be due from the bankers to the petitioning creditor.⁸ But where

¹ *Doe v. Anderson*, 5 M. & S. 161.

² *Small v. Marwood*, 9 B. & C. 300.

³ *Ambrose v. Clendon*, 2 Str. 1042. Cas. temp. Hard. 267. In re Bryant, 1 Rose, 283.

⁴ *Bickerdike v. Bollman*, 1 T. R. 405. And see *ex parte Magnus*, 2 M. D. & D. 604.

⁵ *Geddes v. Mowat*, 1 G & J. 414, where it is said that the same rule holds with respect to a sequestration in Scotland; and see *Brown v. Watts*, 1 Taunt. 353.

⁶ *Ex parte Ashton*, 2 D. & C. 5.

⁷ *Ex parte Lee*, 1 P. Wms. 782.

⁸ *Simpson v. Sikes*, 6 M. & S. 295.

the petitioning creditor had, upon an application for a loan from a bankrupt, delivered to him a check on his bankers for 100*l.*,—which check had got back again to the hands of the petitioning creditor, as if satisfied, but the petitioning creditor was unable to give positive proof that the check was *actually* paid,—the check itself was held not sufficient evidence of a petitioning creditor's debt.¹

A debt composed partly of the amount of a bill of exchange, and partly of *interest* calculated thereon, is not a good petitioning creditor's debt, unless such *interest* be *expressed in the body of the bill*; for *interest*, when it is not specified in the contract, forms no part of the debt at law, but is only given as *damages* for the detention of the debt.²

If the petitioning creditor is indorsee of a bill of exchange, it must appear that the bill was outstanding against the bankrupt before the act of bankruptcy,³ and that the bill was in the hands of the petitioning creditor, when he sued out the fiat.⁴

The debt must also be a *present existing debt*, and not one depending on a *contingency*. Where a promissory note, therefore, was given to a trustee under a marriage settlement, though it was in form a present debt, and payable on demand, yet as it was in fact only a security for a *contingent debt* under the settlement, which would not be payable, unless the wife died before her husband,—it was held not a sufficient debt to support a commission against the maker of the note.⁵ But it seems that a *warrant of attorney*, though appearing by the defeazance to be given really as a security against the running acceptances of the conusor, is a *debitum in presenti* sufficient to support a fiat.⁶

A debt on an account, though *not liquidated*, has been held sufficient, if the creditor can swear to a balance amounting to the requisite sum;⁷ but, in a later case, where the accounts were very intricate, this was considered an objection.⁸

A debt upon an *attorney's bill*, though it has not been taxed, or signed and delivered, pursuant to the statute,⁹ is sufficient to support a fiat, though not an action; but, in

¹ *Bleasby v. Crossley*, 2 Carring. & P. 213. 3 Bing. 430.

² *In re Burgess*, 8 Taunt. 660. 2 Moore, 745. Ex parte Greenway, Buck. 412. *Cameron v. Smith*, 2 B. & A. 305. Ex parte Marlow, 1 Atk. 150.

³ *Key v. Cook*, 2 M. & P. 30.

⁴ Ex parte *Cattley*, 4 Dea. 138. And see ex parte *Magnus*, 2 M. D. & D. 604.

⁵ Ex parte *Page*, 1 G. & J. 100.

⁶ *Miles v. Rawlins*, 4 Esp. 194.

⁷ *Flower v. Herbert*, 2 Ves. 326.

⁸ Ex parte *Bowes*, 4 Ves. 168.

⁹ 3 Geo. 2, c. 23, s. 22.

such a case, the bill will be afterwards referred to the master to be taxed;¹ and this may be done, (if the bankrupt had a right to have it taxed at the time of the bankruptcy,) either upon the application of the bankrupt himself, or of any of the creditors.² And if, after the taxation, it is reduced below the proper amount to constitute a petitioning creditor's debt, the fiat will be annulled.³ Where a solicitor, pending an order for the taxation of his bill, and for *staying all proceedings at law* in the meantime, sued out a commission of bankrupt upon it, it was held neither to amount to a contempt, nor to be a sufficient cause for superseding the commission; as the order extended only to bringing actions, and the common and ordinary proceedings.⁴ But where costs were taxed upon a judgment, as in case of a nonsuit, under a rule of court, upon which an attachment had issued against the party, and he had been taken into custody, they were held not to constitute a good petitioning creditor's debt.⁵

If one tradesman becomes security for another, for the absolute payment of the debt, the creditor may take out a fiat against the *surety*.⁶

So a *sum awarded* by an arbitrator will support a fiat against the person who is awarded to pay it, notwithstanding a bill is filed to set aside the award; for the arbitration bond is a debt at law, and binds the parties, until the award is set aside for any defect in it.⁷

A *factor* who sells goods in his own name, though without a *del credere* commission, is a good petitioning creditor against the purchaser; and it makes no difference, if he communicates the name of the purchaser to his principal; unless indeed the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser.⁸

A fiat cannot be supported upon a debt due to a natural-born subject, voluntarily residing and carrying on trade in an *enemy's country*; and where some only of the partners of a firm were in that predicament, the debt due to the partnership was held incapable of supporting a commission.⁹ But, where one of two partners had a *licence* granted by an order in council to export and import certain goods to and from an

¹ *Ex parte Steele*, 16 Ves. 166.
Ex parte Howell, 1 Rose, 312.

² *Ex parte Prideaux*, 1 G. & J. 28.

³ *Ex parte Ford*, 3 Dea. 494.

⁴ *Moseley's Rep.* 27. 1 C. B. L. 17.

⁵ *Ex parte Stevenson*, Mont. & M. 262.

⁶ *Haylor v. Hall*, Palm. 325.
Dezham's case, Stone, 183.

⁷ *Ex parte Lingood*, 1 Atk. 241.

⁸ *Sadler v. Leigh*, 4 Cowp. 195.

⁹ *McConnell v. Hector*, 2 Bos. & P. 113.

enemy's country, and was there only for the fair purposes of the licence when the commission issued, such a temporary residence was deemed not to invalidate the debt.¹ So a mere *involuntary residence* of one partner in an hostile country, without any proof of adhering to the enemy, will not prevent his right to be a petitioning creditor with the other partner.²

A creditor of an *insolvent trader*, notwithstanding the discharge of the latter under the insolvent act, it has been held, might take out a commission of bankrupt against him, where his debt was not included in the insolvent's schedule;³ and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt *at law* to support a fiat, notwithstanding the court of review may, upon a representation of the circumstances attending the issuing of such a fiat, be induced to annul it.⁴

A *penalty due to the crown* ⁵ is a sufficient debt to support a fiat, as well as an assessment for *church and highway rates*; ⁶ and the assessor in the last case is a good petitioning creditor.

It was questioned, but not determined, in one case, whether a commission was valid, that was sued out upon the petition of three or more creditors, whose debts did not altogether amount to the requisite sum, although the debt of one was more than sufficient to maintain a fiat sued out on his own separate petition.⁷ But it seems that such a commission was bad; for though *that one creditor might alone* have sued out a commission upon his own debt, yet as he chose to take one out in conjunction with other persons, pursuant to the terms of the statute, there does not appear any reason why the regulations of the statute, which require the *aggregate* of the debts to amount to a certain sum, should be in such a case dispensed with.

Substitution of debt.] If after adjudication the petitioning creditor's debt be found insufficient to support a fiat, it was provided by the 6 Geo. 4, c. 16, s. 18, that in that case the lord chancellor, upon the petition of any other creditor or creditors who had proved a debt or debts sufficient to support

¹ *Ex parte Baglehole*, 1 Rose, 256. *Ex parte Barrington*, 2 M. & A. 255. 1 Dea. 3. *Ex parte Sidebotham*, 4 D. & C. 698.

² *Roberts v. Hardy*, 3 M. & S. 533. ⁵ *Cobb v. Symonds*, 5 B. & A. 516.

³ *Ex parte Shuttleworth*, 2 G. & J. 68. ⁶ *Lloyd v. Heathcote*, 2 B. & B. 388.

⁴ *Jellis v. Mountford*, 4 B. & A. ⁷ *Smith v. Miles*, 1 T. R. 481.

a commission, (provided the same were not incurred *anterior* to the debt of the petitioning creditor,)¹ might order the commission to be proceeded in. It has been held in one case, that the creditor cannot apply, without going first before the commissioner to have the debt of the petitioning creditor expunged.² But this does not seem to be absolutely necessary.³ The above section has been held to apply, not only to a deficiency in the amount, but also to any original defect in the nature of the petitioning creditor's debt.⁴ And where a petitioning creditor had sold the bankrupt's goods, in payment of which he took three bills of exchange accepted by the bankrupt, which the creditor negotiated, and which were not in his hands, nor due, at the time he issued the fiat; and the commissioner expunged the proof of his debt, on the ground that the bills were not in his possession at the time of the bankruptcy; it was held that an order might be made for the substitution of the debt of another creditor, notwithstanding the commissioner had decided that the petitioning creditor had no debt.⁵ An order for the substitution of another debt has been held invalid, unless it expressly finds, that the original petitioning creditor's debt was insufficient,⁶ and that the debt to be substituted was *proved* under the fiat, before the petition to substitute was presented.⁷ The petition on which the order is made cannot be used to explain any ambiguity in the order; but a mere clerical error will not vitiate the order.⁷ Where the commissioner finds that the petitioning creditor's debt is insufficient, he should also expressly find that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt;⁸ but the court may be also satisfied of the fact by other evidence.⁹ Under such an order, the debt proposed to be substituted may be added to that of the petitioning creditor, to make up the requisite amount.¹⁰ A surety for the bankrupt paying the debt after the issuing of the fiat, and after the creditor has

¹ For the relation to the act of bankruptcy cannot be carried back, beyond the accruing of the petitioning creditor's debt; and see post, "Relation."

² *Ex parte Chappell*, 2 G. & J. 131. *Ex parte Neal*, 2 G. & J. 308.

³ *Ex parte Robinson*, 1 Mont. & M. 44.

⁴ *Ex parte Hall*, 1 Mont. & M. 39. *Ex parte Smith*, 3 M. D. & D. 345.

⁵ *Ex parte Smith*, 3 M. D. & D. 341.

⁶ *Musket v. Drummond*, 10 B. & C. 153.

⁷ See 1 M. D. & D. 219, note (b). *Christie v. Unwin*, 3 Per. & D. 204. 11 Ad. & E. 373. *Brancher v. Motynaux*, 4 Man. & G. 226. 4 Scott, N. R. 753.

⁸ *Ex parte Hunter*, 2 D. & C. 507.

⁹ *Ex parte Pubery*, 2 M. D. & D. 184.

¹⁰ *Byers v. Southwell*, 6 Bing. N. C. 39.

proved it, may substitute the debt so proved for the original petitioning creditor's debt.¹ It has been doubted, however, whether such an order can be used to the prejudice of a party who has already brought an action, in which he seeks to impeach the validity of the fiat, by reason of the insufficiency of the petitioning creditor's debt;² the order ought therefore to be, without prejudice to the defendant in the pending action.³ But, where a defendant in a pending action petitioned against the amendment of a clerical error, in an order for the substitution of a petitioning creditor's debt,—or, if such amendment should be directed, that the original order might not be dated prior to the order of amendment; the court of review refused to entertain such an application.⁴ There is no necessity that the defendant should have notice of the application to amend the order.⁵ Where the order is amended, the amended order must be taken to operate from its original date.⁶

With respect to the costs upon the substitution of another debt, it was laid down by Sir J. Leach, that the petitioning creditor was not liable to costs, unless he had been guilty of fraud or misconduct.⁷ It was afterwards held, that the costs must in general be paid by the petitioning creditor, and not out of the bankrupt's estate;⁸ but where there was a mere mistake in the account between the petitioning creditor and the bankrupt, which was not occasioned by the fault of the petitioning creditor, the costs were directed in that case to come out of the estate;⁹ and the same where the petitioning creditor was insolvent.¹⁰ The petition to substitute must be served upon the petitioning creditor, although his debt has been expunged, and although the petition does not pray costs against him.¹¹ Where, on a petition to annul for want of a petitioning creditor's debt, the validity of the debt is a fair subject of doubt, the court will allow the petition to stand over, to give time for an application to substitute a new debt.¹²

¹ Ex parte *Rogers*, 4 D. & C. 623.

² *Aireton v. Davies*, 9 Bing. 740.
³ *Moore & S.* 138.

⁴ Ex parte *Watson*, 3 Dca. 310.

⁵ Ex parte *Molyneux*, 2 M. D. & D. 656.

⁶ 2 M. D. & D. 572. 4 Scott N. R. 753. 4 Man. & G. 226.

⁷ *Brancker v. Molyneux*, 4 Man. & G. 276.

⁸ Ex parte *Cousins*, 2 G. & J. 270.

⁹ Ex parte *Hayne*, 4 D. & C. 403.

Ex parte *Cattley*, 4 Dea. 138. Ex parte *Ullathorne*, 1 M. D. & D. 338.

¹⁰ Ex parte *Whalley*, 3 M. & A. 206.

¹¹ Ex parte *Sherborn*, 2 M. D. & D. 693.

¹² Ex parte *Ward*, 3 M. D. & D. 294.

¹³ Ex parte *Magnus*, 2 M. D. & D. 604.

SECTION III.

Of the time of contracting and accruing of the Debt.

The debt must either be contracted, or at all events be subsisting, *whilst the party is in trade*;¹ therefore, though a creditor whose debt was contracted *before*² the party entered into trade, may sue out a fiat on his debt, yet a creditor for a debt contracted *after leaving off trade* cannot³ do so, nor where only part of the debt is contracted after ceasing to trade, and the remainder is not of the requisite amount to support the fiat,⁴—though, at the same time, this is no objection to such a creditor *proving* his debt, in order to receive⁵ a dividend. And if a simple contract debt is contracted *whilst the party is in trade*, though he gives the creditor a bond for it, *after leaving off trade*,—this will not be such an extinguishment of the debt, as to prevent the creditor from suing out a fiat on it;⁶ for though the bond would be a bar to an action, yet it will not prevent the creditor *under a fiat* from proving the consideration. But, if a trader indebted in 100*l.* quit his trade, and afterwards become indebted to the same creditor in 100*l.* more, and then pays 100*l.*, without saying on what account,—the creditor in this case cannot take out a fiat upon the old debt; for, without special directions as to the application of the payment, it will be presumed to be applied in payment of the former debt.⁷

The debt must also be contracted by, or payable from, the bankrupt, *previous to an act of bankruptcy*; and it is not sufficient that it accrued previously to the issuing of the fiat.⁸ But it is provided by the 6 Geo. 4, c. 16, s. 19, that no commission shall be deemed invalid, by reason of any act of bankruptcy *prior* to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy *subsequent*

¹ *Doe v. Lawrence*, 2 Carring. & P. 134.

² *Butcher v. Easto*, 1 Doug. 295. *Bailie v. Grant*, 9 Bing. 121. 2 Moore & S. 193.

³ *Meggott v. Mills*, 1 Ld. Raym. 287. 12 Mod. 159. Comb. 463. *Dawe v. Holdsworth*, Peake, 64. *Penriz v. Daintry*, 1 Sid. 411.

⁴ *Ex parte Dalby*, 4 Dea. 261.

⁵ 1 Ld. Raym. 287.

⁶ Peake, 64.

⁷ *Meggott v. Mills, Dawe v. Holdsworth*, supra.

⁸ *Moss v. Smith*, 2 Camp. 489. *Clarke v. Askeu*, 1 Star. 458. In one old case (*De Golls v. Ward*, Forrest, 243. 4 Brown Parl. Ca. 327.) it was decided to be sufficient, if the petitioning creditor was a creditor at the time the commission issued; but this Lord Hardwicke considered was altered by the 5 G. 2, c. 30; and see 1 C. B. L. 23.

to such debt. This enactment is consistent with that of the 46 Geo. 3, c. 135, which was passed to remedy a great inconvenience in the bankrupt law; for, before that statute, if *any* act of bankruptcy whatever was shown to have been committed by the bankrupt before the petitioning creditor's debt accrued, it abrogated the commission, and all the subsequent proceedings on it,—notwithstanding there was in reality an act of bankruptcy *after* the petitioning creditor's debt.¹ So that the petitioning creditor always encountered the risk of having the commission superseded, and the assignees the danger of failing in actions for the recovery of the bankrupt's property, by the other party setting up any prior secret act of bankruptcy.² The 46 Geo. 3, c. 195 was confined, however, to cases where the petitioning creditor had *no notice*³ of the prior act of bankruptcy; but the 6 Geo. 4, c. 16, includes all acts of bankruptcy (without any restriction) before the petitioning creditor's debt. Therefore, as the law now stands,—whether the petitioning creditor has notice, or not, of any previous act of bankruptcy before the contracting of his debt, it will not invalidate the fiat, if there is a sufficient act of bankruptcy *after* the accruing of the debt.

But the debt must be a *complete* and perfect debt *before* the act of bankruptcy. When, therefore, the debt was founded upon a *verdict* for damages for a *tort* obtained before, but upon which *judgment was not entered up till after* the act of bankruptcy, this was determined to be not a sufficient debt to support a commission; for the debt in law does not accrue, until the judgment is regularly entered on the roll.⁴ So, where the act of bankruptcy, on which the commission was founded, was a *lying in prison*, and the *debt was contracted after the arrest*, it was holden insufficient.⁵ But the acceptance of a security of a higher nature,⁶ or the obtaining judgment⁷ after an act of bankruptcy will not, as we have seen, prevent the creditor from suing out a fiat on a

¹ It was not, however, competent to the *bankrupt himself* to set up a former act of bankruptcy, in order to invalidate the commission. And proof of a prior act of bankruptcy would not, *of itself*, invalidate the commission,—without proving also a prior debt sufficient to sustain a commission. *Ree v. Bullock*, 1 Taunt. 71.

² *Toms v. Mytton*, 2 Str. 744.

³ But the petitioning creditor was not *presumed* to have had

notice of an act of bankruptcy prior to his debt, although it might *appear from the depositions* to have been actually committed before it. *Thackrah v. Wood*, 3 Star. 141.

⁴ *Ex parte Charles*, 14 East, 197. 16 Ves. 256. *Buss v. Gilbert*, 2 M. & S. 70.

⁵ *Ex parte Daggett*, Whitm. B. L. 42.

⁶ *Ambrose v. Clendon*, &c. ante, 94.

⁷ *Bryant v. Withers*, 2 M. & S. 123. 2 Rose, 12.

bonâ fide pre-existing debt. A petitioning creditor's debt on a balance of accounts, which continued running up to the time of issuing the commission, and always against the bankrupt to the extent of 100*l.*, was held a good debt to support a commission, notwithstanding payments had been made sufficient, if applied in this order of time, to discharge the particular balance due at the time of the act of bankruptcy.¹

A bill of exchange, or a promissory note, is a debt from the *date* of it; therefore an indorsee of a note made and negotiated by the bankrupt before, but indorsed by the payee to the creditor after, an act of bankruptcy, is a good petitioning creditor; for he is considered to stand in the place of the indorser,—and the debt, as to the bankrupt, is not created by the indorsement, but by the making of the note. The drawer or maker of a bill or note contracts in fact a debt, the moment the bill or note is given by him,—and any subsequent indorsement relates to the original debt;² but it seems that the petitioning creditor must show, that it was indorsed to him before he *sued out the fiat*, and was then in his hands,³—though the debt need not exist in him, if it was contracted by the bankrupt, before the act of bankruptcy. And where a commission had been sued out upon a bill of exchange for 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards,—and the debt was objected to, on the ground that, at the time of the act of bankruptcy, 100*l.* was not due, but only that sum minus the discount,—the court thought it sufficient, upon the above principle, viz. that the drawer contracts a debt the moment the bill is given.⁴ So, where the bankrupt was the drawer of the bill, and committed an act of bankruptcy before either the bill was due, or had been presented for acceptance, it was held that the bill was a sufficient petitioning creditor's debt,—although it appeared, that subsequent to the commission, the bill had actually been paid by the acceptor.⁵

In these cases it will be observed, that the bills had not arrived at maturity, before the act of bankruptcy committed by the drawer; but when the bill has already become *due*, it is then necessary, in a fiat against the *drawer*, to prove pre-

¹ *Shaw v. Harvey*, 1 Mood. & M. 526.

² *Ex parte Thomas*, 1 Atk. 73.
³ Wils. 135. *Macarty v. Barrow*,
 2 Str. 949. *Bingley v. Maddison*,
 1 C. B. L. 20. *Glaister v. Haver*,

7 T. R. 498. *Brett v. Levett*, 13 East, 213.

⁴ *Rose v. Roscroft*, 4 Camp. 245.
Ex parte Catlley, 4 Dea. 138. *Ex parte Magnus*, 2 M. D. & D. 804.

⁵ *Brett v. Levett*, 13 East, 213.

⁶ *Ex parte Douthal*, 4 B. & A. 67.

sentation and notice of dishonour.¹ Where a creditor transfers a bill of exchange indorsed to him by his debtor, the holder of the bill is the proper petitioning creditor,² and not the creditor who has negotiated the bill.³ A fiat therefore issued by an indorsee of a bill under these circumstances will be annulled at the costs of the petitioning creditor.⁴ And the same, where a petitioning creditor's debt was made up of a sum paid by him in part discharge only of a bill which he had accepted as surety for the bankrupt, but the bill itself continued in the hands of an adverse holder.⁵ Where a party accepted a bill in the bankrupt's name, without his authority, an acknowledgment by the bankrupt to the holder of the bill, after it became due, that he was responsible for the payment of the bill, was held not to constitute a good petitioning creditor's debt.⁶ It is *prima facie* evidence that a promissory note was in existence before an act of bankruptcy, that it is proved to have been in existence before the docket was struck, and bears date upon the face of it before the act of bankruptcy.⁷ But the mere date is not, of itself, sufficient proof of its existence before the act of bankruptcy.⁸

If two persons *exchange acceptances*, and before the bills are mature, one of them commits an act of bankruptcy, there is not such a debt due from him as will sustain a commission; for it would be inconsistent, that a man who is not entitled to receive a shilling out of the bankrupt's estate, unless he pays his counter-bill, should be able to stop the bankrupt's trade by taking out a commission.⁹ And the acceptor of an *accommodation bill*, who, after the act of bankruptcy of the drawer, pays the amount of it to a person to whom it had been negotiated, has not a good petitioning creditor's debt; for, before such payment, he was a mere surety for the bankrupt, and did not become a creditor before he *actually paid* the bill, which was after the act of bankruptcy.¹⁰

It has been holden in several of the earlier cases, that a debt, though barred by the *statute of limitations*, would support a commission, on the ground that the statute did not

¹ *Cooper v. Machin*, 1 Bing. 426.

² *Ex parte Bottom*, 1 Mont. & B. 412.

³ *Ex parte Cattley*, 4 Dea. 138.

⁴ *Ex parte Putzaker*, 2 Dea. 469.

⁵ *Ex parte Caldecott*, 4 Dea. 264.

⁶ *Ex parte Edwards*, 2 M. D. & D. 241.

⁷ *Obbard v. Betham*, 1 Mood. & M. 486.

⁸ *Wright v. Lainson*, 2 Mees. & W. 739.

⁹ *Sarrat v. Austin*, 4 Taunt. 200.
Bleasby v. Crossley, 2 Car. & P. 213.

¹⁰ *Ex parte Holding*, 1 G. & J. 97.

extinguish the debt, but the remedy, and that the statute, moreover, extended only to the particular remedies *by action* therein mentioned. In one of the cases, indeed, it was admitted, that the *bankrupt himself* might apply in such a case to supersede the commission; but that if *he* submitted to it, a debtor of the bankrupt, or any third person, could not avail himself of it as a defence to invalidate the commission, and thus elude the payment of a just debt to the assignees.¹ In one of the later cases, however, where the bankrupt had died before surrender, and consequently had never the power to avail himself of the objection, Lord Eldon decided, that a *creditor* might do so, by applying to take out another commission upon another debt; and, after observing upon all the antecedent cases on the subject, questioned the law laid down by Lord Mansfield in *Fowler v. Brown*; adding, that he saw no reason why it was not competent to the bankrupt in the first instance to take the objection, and if he waived it, then for the creditors to avail themselves of it.² And in a subsequent case, where the same question occurred, his Lordship intimated that he had many additional reasons confirmatory of his former decision.³ It was indeed held in one case, that, as long as any remedy was open by which the debt could be recovered, the objection could not be taken, either by the bankrupt, or the creditors. As, where in an action brought in the Common Pleas by a bankrupt to try the validity of a commission, the defendant produced an office copy of a roll in the court of King's Bench, by which it appeared, that an action had been commenced there against the bankrupt and his partner more than six years before, and that continuances of mesne process had been regularly entered, and brought down to the term before the trial in the Common Pleas,—the latter court decided, that the debt in this case was not barred by the statute, as it might have been recovered against the bankrupt in the court of King's Bench.⁴ But, though this decision was come to by the court of Common Pleas after two arguments, it was afterwards reversed upon a writ of error in the court of King's Bench.⁵ It appeared, however, upon the argument in the King's Bench, that the different writs, relied on to save the statute of limitations, had not been

¹ *Swayne v. Wallinger*, 2 Str. 746. *Quantoek v. England*, 2 Bl. 703. 5 Burr. 2628. *Fowler v. Brown*, 1 C. B. L. 13.

² *Ex parte Dewdney*. *Ex parte Seaman*, 15 Ves. 494.

³ *Ex parte Raffey*, 2 Rose, 245.

⁴ *Gregory v. Hurrill*, 3 B. & B. 212. 6 Moore, 525. 2d argumt. 1 Bing. 324. 8 Moore, 189.

⁵ 5 B. & C. 341.

returned and filed, nor the continuances entered on the roll, until after the issuing of the commission.

An executor may sue out a fiat on a debt due to his testator, even *before probate* of the will, provided he obtains the probate before the adjudication of the bankruptcy.¹ And where the probate had an insufficient stamp upon it in the first instance, it was held that, upon a valid stamp being afterwards affixed to it, though after adjudication, the probate would then be good by retrospection, and would support the executor's debt as petitioning creditor.²

To sustain a fiat upon a debt due to the wife, *dum sola*, she must in general be petitioning creditor jointly with her husband,³ and this, though the debt is due to her in *autre droit*, viz. as executrix.⁴ But a bill of exchange payable to the wife before marriage, being an instrument transferable at law, and the right of action shifting with the possession of it, is to be considered, not as a *chose in action*, but rather as a chattel personal vested in the husband by the act of marriage;⁵ and it has been accordingly determined, that the husband alone might sue out a commission upon a promissory note given to the wife *dum sola*.⁶

When either of the parties is an *infant* at the time of contracting the debt, whether debtor⁷ or creditor,⁸ the debt will not support a fiat. But where a bill of exchange was drawn upon a trader, when an infant, but accepted by him after he was of age, this was holden to be a sufficient debt.⁹

All contracts *in trade*, made by *clergymen*, whilst in *holy orders*, being, as we have already seen,¹⁰ absolutely null and void, it follows, of course, that any debt arising from such a contract would not support a fiat.

A tender made to the petitioning creditor of the payment of his debt, after a docket had been already struck against the bankrupt, is not sufficient to defeat the fiat, although it was made before the fiat actually issued.¹¹

¹ Ex parte Paddy, Buck. 235.
³ Madd. 241.

² Rogers v. James, 2 Marsh. 425.
⁷ Taunt. 147.

³ Rumsey v. George, 1 M. & S. 176. Ex parte Staples, 7 Vin. Abr. 67. Master v. Winter, Dav. 464.

⁴ Ex parte Mogg, 2 G. & J. 397.
Master v. Winter, cit. ibid. 398.

⁶ M'Neillage v. Holloway, 1 B. & A. 218.

⁵ Ex parte Barber, 1 G. & J. 1.

⁷ Ex parte Barwis, 6 Ves. 601.

Ex parte Sydebotham, 1 Atk. 146.

⁸ Ex parte Barrow, 3 Ves. 554.

Ex parte Moreton, Buck. 42.

⁹ Stevens v. Jackson, 4 Camp. 164.

¹⁰ Ante, p. 23. 57 G. 3, c. 99, s. 3.

¹¹ Ex parte Jones, 3 D. & C. 697.

SECTION IV.

General Duties and Liabilities of the Petitioning Creditor.

And see post ch. 22, as to the costs of the petitioning creditor.

The petitioning creditor must attend in person before the commissioner at the opening of the court to prove his debt,¹ and he must also make a second proof of it at a public sitting of the court, in order to entitle himself to the benefit of the fiat. Where he voted in the choice of assignees, without making such second proof, the choice was set aside.²

Where a creditor, upon a judgment, has sued out an execution against the *person* of his debtor, he is estopped from afterwards petitioning for a fiat against him;³ for, taking the body in execution is considered, in law, a satisfaction for the debt;⁴ and he cannot, after thus making his election, change the nature of his execution, and pursue his debtor's property.⁵ But, where a defendant was in execution for a debt due to two partners, and afterwards one of the partners sued out a commission against him, for a separate debt due to himself,—this was held not to be affected by the previous proceeding for the joint debt.⁶ And a proceeding under a judgment, *not against the person*, is not any objection to issuing a fiat upon the unsatisfied debt.⁷ Notwithstanding, also, a plaintiff sues out a fiat against his debtor, after previously taking him in execution,—yet a *court of law* has no power to discharge the defendant out of custody; this being a matter coming under the peculiar cognizance of the jurisdiction in bankruptcy.⁸

The petitioning creditor has not the *election*, which the *other creditors* of the bankrupt possess, either to come in as a creditor under the fiat, or to sue the bankrupt at law; for if he were permitted to proceed at law, the fiat must be annulled, which would materially affect those creditors who had proved under it—as it would render their proofs per-

¹ General Order 26, Nov. 1798; 17 Ves. 415; and see post, ch. 6.

² Ex parte Rawson, 2 G. & J. 353. Ex parte List, 2 Ves. & B. 374.

³ Barnaby's case, 1 Str. 653. Cohen v. Cunningham, 8 T. R. 123.

⁴ Foster v. Jackson, Hob. 52. Vigers v. Aldrich, 4 Burr. 2482. Jaques v. Wilby, 1 T. R. 557. Tan-

ner v. Hague, 7 T. R. 420. Clarke v. Clement, 6 T. R. 525.

⁵ This observation is, of course, to be taken, subject to the provisions on this head contained in the different insolvent acts.

⁶ Ex parte Stevens, 1 C. B. L. 25.

⁷ Miles v. Rawlins, 4 Esp. 194.

⁸ M'Master v. Kell, 1 Bos. & P. 302.

fectly nugatory. His election is, therefore, determined by taking out the fiat; and this, not only as to the debt upon which the fiat is founded, but also as to every other claim which he may have against the bankrupt; an incapacity, which does not attach to the general creditor; for, if the latter has demands against the bankrupt of a distinct nature, he may prove one debt under the fiat, and proceed at law for the recovery of the other.¹ And though the fiat has not been opened, the petitioning creditor will equally be prevented from proceeding at law against the bankrupt; for, as long as the fiat is capable of prosecution, this disability is held to attach.²

A petitioning creditor, however, who took out a separate commission against one of three partners for a joint debt, (which was afterwards superseded, and a joint commission taken out by another creditor,) was held to be not deprived of his election, under the *second* commission, to prove either against the *joint*, or *separate* estate.³ And a petitioning creditor having a joint and also a separate debt, each of sufficient amount to support a fiat, who sues out a separate fiat, may receive dividends out of the separate estate in respect of his joint debt, *pari passu* with the separate creditors.⁴ But a joint creditor, who sues out a joint fiat against partners, or a fiat against a trader as a *surviving partner*, can only prove, under that fiat, against the joint estate.⁵

The petitioning creditor incurs many liabilities, if he commits irregularity in suing out the fiat; for, if it is annulled after adjudication for want of any of the legal requisites, it is always at his costs;⁶ and the bankrupt has also his remedy against him, by bringing an action on the case for damages.

So also, the costs of an application to substitute another debt for the debt of the petitioning creditor will be ordered to be paid by him, if he has been guilty of any misconduct.⁷ In one case, however, he was held not responsible for the costs of an action brought by the assignees, nor for the expenses of superseding the commission, although it appeared that there was not a sufficient trading, on the ground that it was the duty of the assignees in that case to satisfy themselves sooner whether the commission was well founded.⁸

¹ See post, "Election."

² Ex parte *Prowse*, 1 G. & J. 92.

³ Ex parte *Smith*, 1 G. & J. 256.

⁴ Ex parte *Burnett*, 2 M. D. & D. 357.

⁵ Ex parte *Burned*, 1 G. & J. 309.

⁶ Ex parte *Fletcher*, 2 D. & C. 374.

⁷ Ex parte *Cousins*, 2 G. & J. 270.

Ex parte *Lloyd*, 2 D. & C. 506.

⁸ Ex parte *Paul*, Mont. & M. 185.

The petitioning creditor is also personally answerable to the messenger for his costs, as taxed by the commissioner, up to the choice of assignees;¹ as well, indeed, as for all the costs of working the fiat up to that period; though, if the fiat is proceeded in, the assignees are then bound to reimburse him the amount,² that is, provided the funds of the bankrupt's estate are sufficient for the purpose—and if insufficient, he must make up the deficiency out of his own pocket.³ But this liability is only for the *necessary* expenses of working the fiat; he is not, therefore, liable for the costs of an unnecessary and fruitless journey undertaken by the messenger to a distant place, without any authority from himself.⁴ And if a person, who is not the petitioning creditor, employ an attorney to sue out a fiat, where no effects are received under it, that person is liable to the attorney.⁵

If a groundless application is made to supersede the fiat, the petitioning creditor will in that case be allowed the costs of resisting the application out of the estate.⁶ So, he was held to be entitled to be repaid, out of the bankrupt's estate, a sum paid by him to a creditor, in order to render him a competent witness to support the fiat.⁷

Where a petitioning creditor issues a second fiat, in consequence of the first not being proceeded with, he is not exonerated from making the payments of 10*l.* and 20*l.* to the secretary of the bankrupts and the accountant-general, under the 1 & 2 Will. 4, c. 56, ss. 45, 46, notwithstanding those payments were made by the first petitioning creditor.⁸

The petitioning creditor is bound to be assistant to the fiat in all its stages, which (as it originates from himself) he is pledged to the validity of. Therefore, where a petitioning creditor agreed with the bankrupt that he would not oppose his petition for a *supersedeas*, in consideration of the bankrupt giving him a warrant of attorney for the amount of his debt; the court of Common Pleas set aside the judgment entered upon it, Sir J. Mansfield saying, that it was the duty of the petitioning creditor to support the commission.⁹ He ought, also, to make due inquiry as to all the circumstances affecting the bankruptcy, before he issues a

¹ Ex parte *Johnson*, 1 G. & J. 23. *Burwood v. Kant*, 2 Carring. & P. 123. And see post, chap. 22.

² *Hartop v. Jukes*, 2 M. & S. 438. *Hart v. White*, 1 Holt, 376. *Finchett v. How*, 2 Camp. 276.

³ Ex parte *Roscoe*, 1 Meriv. 190.

⁴ *Billings v. Waters*, 1 Star. 363.

⁵ *Pococke v. Russell*, 1 Mood. & M. 358. 4 C. & P. 14.

⁶ Ex parte *Bottomley*, 5 Mad. 91.

⁷ Ex parte *Forth*, 2 M. & A. 381.

⁸ Ex parte *Osborne*, 4 D. & C. 398. Ex parte *Williman*, Id. 810.

⁹ *Thomas v. Rhodes*, 3 Taunt. 478.

fiat,¹ and to give information to the assignees, upon every subject that comes within his knowledge, as petitioning creditor. He is bound, therefore, to produce upon a trial a bill of exchange, upon the direct proof of which his own debt, as petitioning creditor, can be established.² And where, shortly before the issuing of a commission, he had taken out execution against the bankrupt for part of the debt on which the commission issued, he was ordered to furnish the assignees with all the particulars of his debt—though this was in aid of an action brought by them against the sheriff, for the very purpose of impeaching the execution, on the ground of a previous act of bankruptcy.³ Where also a petitioning creditor, after the choice of assignees, stated to their solicitor, that the commission was not a good one, because the consideration of the bill on which it was sued out was for a gambling debt, and the assignees were thereby put to expense in establishing the validity of the commission, and also incurred further expenses by his refusal to produce the bill, or to discover what had become of it,—Lord Eldon ordered that he should pay all the costs, which he had thereby occasioned to the assignees.⁴ So, where a fiat was issued by a petitioning creditor, who was a consenting party to a deed of assignment of the bankrupt's effects for the benefit of his creditors, and this deed was set up by him as the act of bankruptcy, it was ordered that he should indemnify the assignees against the invalidity of the fiat, or, in default, that they might issue a fresh one.⁵ It was held by Sir J. Leach, that a petitioning creditor, in a *separate* subsisting commission, was not compellable to attend as a witness before the commissioners, in support of a *subsequent joint* commission,—as that would be in effect to destroy his own proceedings; ⁶ but Lord Eldon subsequently decided the contrary.⁷

The petitioning creditor is estopped by the affidavit of debt, which he makes on suing out the fiat, from contending afterwards that the debt was insufficient to support it. Thus, where the bankrupt's assignees sued him for the bankrupt's money which he had got into his hands, and it accidentally came out by a statement of accounts, that the balance due from the bankrupt was less than what was sufficient to sustain the commission,—the petitioning creditor

¹ Ex parte *Blackmore*, 6 Ves. 3.

² Ex parte *Glossop*, 2 Rose, 386.

Ex parte *Jackson*, Ibid. 188. Ex D. 114.

parte *Graves*, 1 G. & J. 86.

³ Ex parte *Glover*, 2 G. & J. 60.

⁴ Ex parte *Glossop*, *supra*.

⁵ Ex parte *Fernandes*, 1 M. D. &

D. 114.

⁶ Ex parte *Stones*, 1 G. & J. 7.

⁷ Ex parte *Harrison*, 2 G. & J. 135.

was not allowed to avail himself of that fact in order to defeat the action.¹

When any action is brought for the recovery of property wrongfully seized by the messenger under the fiat, the petitioning creditor should be made the defendant in such action, and not the messenger, if the latter has only acted in obedience to the warrant of the commissioners; for, in such a case, the messenger would be entitled at any rate to a verdict. And, if the plaintiff recovers against the petitioning creditor, the latter is liable² not only for the taxed costs of the action, but is also bound to repay the plaintiff such costs as he is obliged to pay to the other defendant. It is provided, also³, that in every such action proof of the defendant being petitioning creditor is sufficient for the purpose of making him liable, in the same manner as if the act complained of had been done or committed by him. A petitioning creditor, who attends at the meeting for the choice of assignees, is protected from arrest, and in returning from the meeting, may stop for reasonable refreshment.⁴

As to the competency of the petitioning creditor as a witness, in actions where the validity of the fiat comes in question, the reader is referred to a subsequent chapter, which treats on evidence in actions by or against the assignees.⁵

Penalties for compounding.] A fiat is not issued for the benefit of the petitioning creditor alone, but is in the nature of an execution for the benefit of all the creditors. It is, therefore, provided by the 8th section of the 6 Will. 4, c. 16, that if the petitioning creditor, *after striking a docket*, receive from the bankrupt any money, or security, either for the whole, or for any portion of his debt, whereby he may receive *more* in the pound than the other creditors, the commission is not only supersedable, but the petitioning creditor is also liable to forfeit his whole debt, as well as to repay or deliver up the money, or security, to such persons as the commissioners shall appoint, for the benefit of the creditors.⁶

¹ *Harmer v. Davis*, 7 Taunt. 577. 1 Moore, 300. *Ledbetter v. Salt*, 4 Bing. 623. See *vide Green v. Jones*, 2 Camp. 412. *Dowden v. Fowle*, 4 Camp. 38. *Loyd v. Strutton*, 1 Star. 40; and see post, "Evidence."

² 6 G. 4, c. 16, s. 34.

³ Section 32.

⁴ *Selby v. Hill*, 8 Bing. 168.

⁵ See post, Ch. 19.

⁶ And see *Ex parte Thompson*, 1 Ves. 157; *Ex parte Stokes*, 7 Ves. 408. *Quære*, whether the chancellor has jurisdiction, under this section, to order the creditor to refund the money so paid by the bankrupt; *Ex parte Dimmock*, 2 G. & J. 261. *Ex parte Marshall*, *Id.* 265. And see ante, p. 16.

And he equally incurs the forfeiture of his debt, though some of the bankrupt's creditors are privy to the transaction.¹ And where a bill of exchange was given by the bankrupt to the petitioning creditor for a portion of his debt, after commission and before certificate, it was held to be void in the hands of the petitioning creditor.² So, a bill given by the bankrupt to the petitioning creditor, in consideration that he would abandon the fiat and all proceedings thereunder, has been held to be void in his hands, as being given for an illegal consideration.³ But, if no further proceedings are taken in the bankruptcy, the petitioning creditor will not be prevented from suing the bankrupt on the original consideration.⁴ And where bankers at Manchester, who, by their agent at Chester, had various pecuniary dealings there with the bankrupt, struck a docket against him on the 2nd of May, without the knowledge of the agent, who received 100*l.* from the bankrupt on the 5th of May, the very day when the fiat issued, in pursuance of a previous engagement with the bankrupt, and in part repayment of a loan of money, which payment was regularly entered in the banker's pass-book;—this was held not to be a case within the 8th section of the act.⁵ So, where a petitioning creditor, in perfect ignorance of the illegality of the transaction, received part of his debt from the bankrupt, after the issuing of the fiat, and refunded what he had so received, with the approbation of the commissioners; the court, on the application of the assignees, ordered the fiat to be proceeded with.⁶

Where a joint creditor struck a docket for a separate fiat against one of two partners, and, after the docket was struck, that partner delivered to him certain bills forming a portion of the joint estate of the partnership, in part satisfaction of his debt; it was held that the creditor did not thereby incur a forfeiture of his debt under the above section, and that the words of that section, "whereby such person may receive more in the pound than *the other creditors*," mean the creditors entitled to receive dividends under the particular bankruptcy; and that the property, to the payment, gift, or delivery, of which the section is meant to relate, is property which forms a subject of distribution under the particular fiat.⁷

¹ *Ex parte Brine*, Buck. 108.

² *Rose v. Main*, 1 Bing. N.C. 357.

³ *Scott*, 127.

⁴ *Davis, v. Holding*, 1 Tyrr. & G. 371. 1 Mees. & W. 159.

⁵ *Davis v. Holding*, 11 Ad. & E. 700.

⁶ *Ex parte Garday*, 2 Dea. 142.

⁷ *Ex parte Nesbitt*, 4 Dea. 171.

⁸ *Ex parte Smith*, 3 M. D. & D. 144.

The forfeiture of the petitioning creditor's debt, for any illegal compounding by him with the bankrupt, is meant to be for the benefit of the creditors under the fiat, and it cannot be enforced, if there is no longer a fiat subsisting.¹

Where a petitioning creditor, after the act of bankruptcy, but *before striking the docket*, received from the bankrupt a sum of money which reduced his debt below 100*l.*,—though Lord Eldon, in such a case, refused to supersede the commission, as the payment could not be retained against the assignees,—yet, as the petitioning creditor had not avowed that he held the payment for the assignees, he was ordered to pay the costs of the petition and inquiry.² Any bargain, also, made by the petitioning creditor with the solicitor upon striking the docket—as to proving the act of bankruptcy, or being indemnified against the expenses of issuing the fiat—has been considered a contempt of the great seal; and an application by the petitioning creditor to carry such a bargain into effect would, of course, be dismissed.³ But, though the petitioning creditor, *after striking a docket*, is prohibited from receiving from the bankrupt any money, or security, whereby he may receive *more* in the pound than the other creditors,—yet it has been determined, that a contract to sue out a commission, in consideration that a friend of the bankrupt would give the petitioning creditor *five shillings in the pound* on his debt, was not illegal,—and that a bill given for the agreed sum was valid.⁴

Where there were only three creditors besides the petitioning creditor, one of whom had consented that the commission should be superseded, and the two others had declined to prove, and the available property of the bankrupt was more than double the amount of his debts; it was held that the petitioning creditor might safely receive from the bankrupt the whole amount of his debt, without being liable to the penalties of the 8th section.⁵

¹ *Davis v. Holding*, 11 Ad. & E. 700.

² *Ex parte Miller*, Buck, 283.

³ *Ex parte Wilson*, Buck. 306.

⁴ *Fry v. Malcolm*, 5 Taunt. 117. And see *Ex parte Green*, 1 D. & C. 230.

⁵ *Ex parte Smith*, 2 G. & J. 291.

CHAPTER V.

OF THE FIAT.

- SECT. 1. *Of issuing the Fiat.*
2. *Of the general Effect of the Fiat.*
3. *Of a Second Fiat.*
4. *Of a Joint Fiat.*
5. *Remedy where the Fiat maliciously sued out.*

For *Opening the Fiat*, see the next chapter.

For the *Costs of issuing the Fiat*, see post, Chapter XXII.

SECTION I.

Of issuing the Fiat.

It is provided by the 1 & 2 Will. 4, c. 56, s. 12, that, in every case where the lord chancellor had power to issue a commission, a *fiat*, in lieu of such commission, may now be issued under the hand of the lord chancellor, the master of the rolls, the vice-chancellor of England, of any master in chancery acting under any appointment by the lord chancellor to be given for that purpose, on petition to the lord chancellor, against any trader having committed an act of bankruptcy, by any creditor of such trader, upon his filing such affidavit, and giving such bond¹ as is by law required; and every fiat (s. 13) is to be filed of record in the court of bankruptcy. By sect. 16, all the laws and statutes, rules and orders concerning bankrupts are declared to extend to the prosecution of fiats, as if every such fiat were a commission of bankruptcy.

And by the recent statute of 7 & 8 Vict. c. 96, s. 41, the lord chancellor is now empowered, upon the petition of any

¹ By the 5 & 6 Vict. c. 122, s. 3, the bond is now dispensed with.

trader himself, to issue a fiat against such trader, provided he files a declaration of insolvency in the bankrupt office, pursuant to the provisions of the 6 Geo. 4, c. 16, s. 6, and the 5 & 6 Vict. c. 122, s. 22.¹ By the general order of 12th November 1842, every fiat, when issued, is to be transmitted by the secretary of bankrupts to the court to which it is directed,—that is, every London fiat, to the chief registrar of the court in Basinghall Street—and every country fiat, by the general post, to the deputy registrar of the district court.

By rule 3,² a London fiat must be forthwith filed of record in the office of the chief registrar, in Basinghall Street, and a minute of the date of so filing the same must be made at the time, in writing, at the foot of the fiat. The fiat is not to be opened, upon the application of any other creditor than the filing creditor, until after the expiration of three days from such date. And no appointment can be made for opening the fiat, until it is so filed.³

Every fiat directed to any district court must,⁴ also, forthwith after its delivery, be registered by a deputy registrar of such court in a book to be kept for that purpose, and a minute of the date of registry of the same must be made at the time at the foot of the fiat: nor can the fiat in this instance be opened by any other creditor, until after the expiration of three days from such date. In districts where there are two commissioners, the fiat is to be allotted by ballot, in the presence of the solicitor, or in rotation, in such manner as the commissioners shall from time to time direct, to one of such commissioners, and must be prosecuted before him. But either of the commissioners may, in the absence of the other, sit or act for him.

Any one or more of a trader's creditors, to the amount required by the statute,⁵ may petition the lord chancellor to issue a fiat against him, upon making a proper affidavit of debt.

Striking a docket.] If the petitioning creditor reside in London or the vicinity, the affidavit must be made⁶ before a master in chancery, or a commissioner, or registrar of the

¹ See ante, p. 80.

² See vol. ii. App.; and 3 M. D. & D. App.

³ General order of July, 1832, vol. ii. App.; and 1 D. & C. App. xxv.

⁴ General order 12 November,

1842, Rule 5. See post, vol. ii. App.; and 3 M. D. & D. App., p. lv. Ante, p. 91.

⁶ See the form, post vol. ii. Before this proceeding, however, search should be made at the bankrupt office, in order to ascertain if any docket

court of bankruptcy,¹ in which he swears that he believes his debtor is become a bankrupt,—an allegation, however, which is not required by any statute, but is merely a practice adopted by the authority of the great seal.² If the creditor resides in the *country*, the affidavit is then made before a master extraordinary in chancery, or district commissioner, or registrar, and is sent to an agent in London to do what is needful. When the affidavit is in either case delivered at the bankrupt office, an entry must be made in the docket-book,³ and the petitioning creditor is then said to have *struck a docket*.⁴ After this, the solicitor must, within the next four days, bespeak the fiat,—upon which he pays the fees for it, and the clerks make out then a petition to the chancellor, and the fiat is prepared at the office. These are tacked together, and at one corner of the petition an order is written: “Let a fiat issue, as prayed, &c.” The petition and fiat are then taken to the chancellor, who signs the *fiat*. The fiat always bears date the day it is signed; and that date is then entered under the column left for it in the docket-book.

Where two parties apply at the same time to strike a docket, and both are prepared to issue a fiat, they must draw lots at the bankrupt office for the preference.⁵ And where instructions for a docket were received from the country on a Sunday by a solicitor, who, before the office opened on the following morning, received similar instructions from another client, it was decided that the same rule of practice should be followed.⁶ If, however, only *one* party is prepared to issue the fiat, then it belongs to the person who is so prepared;⁷ for the drawing of lots only applies to those cases, where *both* parties are equally prepared to issue a fiat forthwith. When one party, therefore, is not prepared to comply with all the forms required by the general order,⁸ the other party is entitled to the fiat.⁹ And where two dockets are struck, of which one is free from objection, and gives full information to the creditors, and the other is calculated to mislead, the

has been already struck; for which purpose the docket-book may be had free access to, from ten in the morning till three in the afternoon, and from six to eight in the evening. See general orders 29th Dec. 1806, and 13th April 1816, and ex parte *Smith*, 19 Ves. 473.

¹ 5 & 6 Vict. c. 122, s. 67.

² 14 Ves. 88.

³ See general orders, 29th Dec. 1806, and 19th April 1815, 2 vol.

⁴ Formerly the petitioning cre-

ditor was obliged to enter into a bond to the lord chancellor for duly proving the debt and the act of bankruptcy; but that proceeding is now dispensed with by the 5 & 6 Vict. c. 122, s. 3.

⁵ General order, 29th Dec. 1806.

⁶ *Haye's case*, 13 Ves. 197.

⁷ General order, 29th Dec. 1806.

⁸ 25th July 1817.

⁹ Ex parte *Hardman*, 1 Jac. & W. 293.

court will prefer that which is free from objection.¹ In all these cases, the first regular docket will be preferred;² but the court will not interfere, unless the officer refuses to issue a fiat, or refers the parties to the court.³

Where a joint fiat was issued against two partners, after which one died, and the petitioning creditor, two days after the death, applied at the office with fresh docket-papers for a separate fiat against the surviving partner, but found that another creditor had previously lodged other docket-papers for a separate fiat; the petitioning creditor under the first fiat was held to be entitled to the preference.⁴

Where a fiat is ordered to be annulled, though on the petition of the assignees, any other creditor may strike a fresh docket against the bankrupt, after the order is pronounced, and even before it is drawn up or signed by the lord chancellor. But the creditor, on whose petition the fiat is ordered to be annulled, has the preference on *immediate application*; and the claim of the assignees to issue a fresh fiat is not greater than that of any other creditor; the rule being, that whoever strikes the *first* docket will be preferred.⁵

Variance.] If there is any variation in the spelling of the name of the bankrupt, even of one letter, it is the practice at the bankrupt office to permit a second docket to be struck by any other creditor; it being taken for granted, that the name is that of a different person;⁶ and the party, having the *first regular docket* in the office, has been considered as entitled to the priority.⁷ But this is not the case, where an order has been obtained to amend the fiat, upon bringing in new docket papers, notwithstanding they are not brought in before the application for the second docket.⁸ And where a solicitor who struck a second docket, because there was an omission of merely one letter in the bankrupt's name, *must have known* it was the same person,—the lord chancellor ordered the second commission to be superseded at the costs of the solicitor.⁹

A docket ought not to be struck, merely as a measure of precaution to prevent another creditor from taking out a fiat.¹⁰ And where it is used as the means of bartering for some

¹ Ex parte *Hill*, Mont. 260. Re *Allday*, 3 M. & A. 485.

² Re *Beale*, 2 Drury & W. 375.

³ Ex parte *Thorp*, 3 M. & A. 395.

⁴ Re *Norris*, 3 Dea. 643.

⁵ Ex parte *Bower*, 1 G. & J. 262.

⁶ 6 Ves. 434. 1 Rose, 314, 1 G. & J. 22.

⁷ Ex parte *Stocker*, 1 G. & J. 249.

Ex parte *Hill*, 3 M. D. & D. 51.

⁸ Ex parte *Harman*, 2 G. & J. 25.

⁹ Ex parte *Ward*, 1 Rose, 314.

¹⁰ 16 Ves. 145.

arrangement, it will, as we have already seen, be considered a contempt of the great seal.¹

When a month passed from the striking of the docket, without any thing further being done, the practice was in such a case, not to let a commission issue, without an affidavit that the petitioning creditor's debt had not been paid.² But by a subsequent general order of Lord Eldon,³ it is declared, that when a docket has been struck more than one calendar month, without a commission having been bespoken, the docket shall be considered as *expired*, and of *no effect* for the purpose of issuing a commission.

Affidavit.] The affidavit made by the petitioning creditor is general, and need not state the particulars by which the bankrupt became indebted;⁴ and if it state that the debt is for goods sold and delivered, though the petitioning creditor had at the time entered up judgment in an action for the debt, this has been held sufficient;⁵ nor will it be any objection to the fiat, that the petitioning creditor had not relinquished his judgment. It is also no objection to the affidavit, that it is sworn before the solicitor suing out the fiat;⁶ but it is an improper practice; and if there is a docket struck by another creditor, where the affidavit is not sworn before the solicitor, to the petitioning creditor, that will be preferred.⁷ Under the 6 Geo. 4, c. 16, s. 13, it was held, that a docket could not be supported on an affidavit sworn in Scotland or Ireland,⁸ but the contrary has been ruled under the 1 & 2 Will. 4, c. 56, s. 34.⁹ The provision in the statute is directory only, and not conditional; therefore, where it appeared upon the face of the affidavits of four petitioning creditors, that their debts did not amount to 200*l.*, though their debts proved before the commissioners amounted to more than that sum,—it was held, that this irregularity did not make the commission void at law, though it might afford

¹ 18 Ves. 298; and see ante, 110.

² Ex parte *Buckley*, Buck. 367.

³ 28th May, 1819. This order, which was made shortly after ex parte *Buckley*, recites the previous practice at the bankrupt office, as being consistent with the directions contained in the order; but this recital does not agree exactly with what is stated by the lord chancellor in that case.

⁴ Ex parte *Ward*, 1 Atk. 153.

Bryant v. Withers, 1 V. & B. 211. Ex parte *Fearman*, 2 G. & J. 26.

⁵ In Re *Bryant*, 1 Rose, 283. *Bryant v. Withers*, 2 M. & S. 123. 2 Rose, 8.

⁶ Re *Elford*, 2 G. & J. 65. Re *Whittle*, ib., note (a). Ex parte *Wright*, 3 M. D. & D. 329.

⁷ Anon. Mont. 136.

⁸ Anon. Mont. 137.

⁹ Ex parte *Ramsay*, 2 M. D. & D. 571.

a ground of application to the lord chancellor to supersede it, or to stay proceedings till the proper affidavits were made.¹ But an affidavit that the bankrupt was indebted to the deponent, "J. M., his co-partner," (omitting the word "and,") was held unavailable for the purpose of striking a docket.² The affidavit, however, is of no use in any period subsequent to the fiat; for it is not even *prima facie* evidence of the debt, either before the commissioners, or in any action where the debt is disputed, which must be proved by other evidence.³

A docket should not be struck, without some solid ground of belief that the trader has committed an act of bankruptcy;⁴ and the affidavit, as to this matter, is too often made with a precipitancy which has called for the censure of the court.⁵ But, if proof can be made of an act of bankruptcy before the issuing of the fiat, though it was in fact committed after the swearing of the affidavit, and the striking of the docket,—the fiat will not on that account be rendered invalid;⁶ provided the fiat itself is signed by the Lord Chancellor after the committing of the act of bankruptcy.⁷ Thus, where the act of bankruptcy was by *lying in prison*, and the docket was struck before the requisite period of imprisonment had expired, the commission was nevertheless supported, which was issued after the expiration of such period.⁸

The petition must agree with the statement of the debt in the affidavit. Therefore, where the secretary to a public company struck a docket for a debt *due to the company*, but the petition stated the debt to be *due to him in his own right*,—it was held, that the commission could not be supported upon a debt due to the company.⁹ It was formerly held, that if there was any error in the affidavit, it could not be re-sworn, and that there must be a new docket.¹⁰ But as there is no longer any stamp duty on the affidavit, this strictness does not seem to be necessary; and the court therefore will permit a mere verbal inaccuracy in the affidavit to be amended.¹¹

Where *partners* are petitioning creditors, it will be suffi-

¹ *Hill v. Heale*, 2 N. R. 196.

² *Ex parte Will*, 3 M. D. & D. 51.

³ *Hill v. Heale*, 2 N. R. 196.

⁴ *Ex parte Bourne*, 16 Ves. 145.

⁵ 6 Ves. 431. 14 Ves. 83. 1 V.

& B. 55.

⁶ *Hopper v. Richmond*, 1 Star.

507. *Ex parte Webster*, 2 G. & J. 252.

⁷ *Simpson v. Sikes*, 6 M. & S. 295.

⁸ *Ex parte Dufrene*, 1 V. & B. 51.

⁹ *Rose*, 333. *Ex parte Parton*, 15

Ves. 462. *Wydown's case*, 14 Ves. 80.

¹⁰ *Guthrie v. Fiske*, 3 Star. 151.

¹¹ *Ex parte Rutledge*, 2 Rose, 369.

Re Lees, 3 Dea. 36.

cient if one of them makes the affidavit;¹ and the same also with respect to *assignees*.²

Delay in applying for fiat.] By an order of Lord Apsley's,³ the mere striking a docket was directed, in no case, to prevent the issuing of a commission by any other creditor, so as such second application was not made before the expiration of four days after the first docket struck. A practice, however, a good deal at variance with the terms of this order, was long permitted to grow up at the bankrupt office, and which, Lord Eldon has observed, afforded testimony that the order itself was inconvenient to be followed; and he thought also, that, if strictly acted upon, it would open a door to great fraud.⁴ It was therefore altered and modified by subsequent orders, both of Lord Erskine and Lord Eldon,⁵ by which it was directed, that if, after striking a docket, the petitioning creditor did not within four days afterwards order a commission to be sealed at the then next public seal, in case there shall be one within seven days after the docket should be struck, or by a private seal within eight days after striking the docket, and cause the same to be sealed accordingly, then any other person might sue out a commission, without any notice to the person who first applied for one. The directions contained in these orders, as to the *sealing of the commission*, will apply now to the *signing of the fiat*. An application for a fiat on the *evening of the fourth day* from striking the docket, immediately before 8 o'clock (the hour of shutting up the office), is now sufficient; and, if necessary, the clerk ought to remain there a quarter of an hour later, to enable the party to proceed next morning to have his fiat signed.⁶ When the fourth day is a holiday,⁷ the party should nevertheless apply for the fiat on that day, at the chambers of the clerk of the secretary of bankrupts; for, if he does not, he runs the risk of losing the fiat, inasmuch as whoever applies first the next day has a right to it.⁸ And where a creditor struck a docket on the 15th October, and within four days ordered the com-

¹ *Ex parte Hodgkinson*, 2 Rose. 172. 19 Ves. 291. *Robert v. Hardie*, 2 Rose, 174 (note). *Ex parte Benjamin*, Buck. 44. *Ex parte Peele*, Buck. 457; but see ante, 89.

² *Ex parte Blakey*, 1 G. & J. 197.

³ 14th Feb. 1774,

⁴ *Ex parte Leicester*, 6 Ves. 433.

⁵ 29th Dec. 1806. 13th April, 1815.

⁶ *Nicholls's case*, 19 Ves. 616.

⁷ By a general order of Lord Eldon's (13th April, 1815), there are now no holidays at the bankrupt office but Christmas-day, Good Friday, and days appointed by proclamation for general thanksgiving or fast.

⁸ *Ex parte Cooper*, 12 Ves. 481; and see 1 Mont. Dig. 77.

mission to be sealed at the next public seal, which would not be till the 2d Nov., and on the 21st Oct. another creditor struck a docket, with directions for the commission to be sealed immediately at a private seal; the last docket was preferred.¹

The meaning of the direction in the above orders was, that the commission should be sealed at the *next immediate* public seal within the seven days, without any discretion on the part of the officers at the bankrupt office to defer the sealing, till a subsequent public seal within the seven days;² therefore where there was a seal on the 5th, and another on the 7th day, it was held that the commission must be sealed on the 5th. But, notwithstanding the terms of the order, and though the creditor does not bespeak the fiat until the 5th day, yet if he does this before any other creditor applies to strike a docket, the application of the first creditor will be preferred.³

Where, however, from some misunderstanding, or from the hurry of business at the bankrupt office, the clerk omitted to get a commission sealed, or make the proper entry in the docket-book, (without which the docket is not considered to be struck),⁴ previously to the application of another solicitor to strike a docket, Lord Eldon thought it would be construing the order too strictly, to deprive the first solicitor of his priority, which had not in fact been endangered through any fault of his.⁵

Upon some occasions, the petitioning creditor has been limited to a shorter time than what is specified in the general orders: as where he had done all other previous acts, but purposely delayed sealing the commission, and took that as an objection to a petition by the bankrupt to supersede it, Lord Eldon limited the time for sealing the commission to three days.⁶

Where a creditor, who had struck a docket, ordered the commission within the four days, and afterwards countermanded the order, and then again changed his intentions, he

¹ *Ex parte Atkinson*, Mont. 137.

² *In Re Lambert*, 1 Rose, 258.

Ex parte Wyne, 19 Ves. 61.

³ *In Re Graham*, Buck. 529.

⁴ Re General Order, 26th Dec. 1806, 13th April, 1815.

⁵ *Ex parte Evans*, 1 Rose, 162.

⁶ 2 Rose, 323. *Ex parte Slatford*, Buck. 1. In one of these cases (2 Rose, 324), Lord Eldon intimated, that it would be an improvement to the above orders, to insert

a provision, that both the clerk of the solicitor applying for the docket, and the clerk at the bankrupt office, should indorse, as a memorandum upon the documents for the docket, the time of their being delivered at the bankrupt office. Such a provision, however, does not seem to have been ever made by any general order to that effect.

⁶ *Ex parte Williams*, 2 Ves. & B. 255.

was, notwithstanding this, held to be entitled (in the absence of any collusion) to have the commission sealed on the seventh day, in preference to another creditor, who struck a docket between the countermand of the order and the seventh day.¹

The fiat must be signed *after* the act of bankruptcy; but it is no objection that the act of bankruptcy is committed the *same day*, provided it be committed *before* the actual signing of the fiat.² And upon one occasion, where it was of importance to prevent the operation of an extent against the bankrupt's effects, Lord Eldon, in order to effect this object, actually sealed a commission in the middle of the night.³

When the fiat has been signed by the lord chancellor, it is said to be *awarded*, which is a matter distinct from the *issuing* of it; for it is not strictly *issued*, until it is delivered into the messenger's hands for the purpose of being opened.⁴ But the *date* of a fiat is *prima facie* evidence of its being issued on that day, within the meaning of the 6 Geo. 4, c. 16, s. 6.⁵

With respect to the issuing of the fiat, the words of the 12th section of the 6 Geo. 4, c. 4, s. 6 follow those in the 13 Eliz. c. 7, as to the issuing of a commission; and they have always been construed to be imperative on the lord chancellor. The granting of a fiat, therefore, if the creditor has pursued the directions of the statute, is not discretionary on the part of the chancellor, but a matter of right on the part of the creditor.⁶ And not only is the granting it a matter *ex debito justitiæ*, but the petitioning creditor has also a right to have the adjudication of the commissioner under it, if the trading, the act of bankruptcy, and his debt can be proved before him. The court, therefore, will not stay proceedings upon a fiat before it is opened, upon a mere allegation that there is no petitioning creditor's debt; for that would virtually be to refuse to issue the fiat.⁷ Upon some occasions, however, the court will restrain the publication of

¹ Anon. 1 Mont. Dig. 77.

² Ex parte *Dobree*, 8 Ves. 82. *Wyldon's* case, 14 Ves. 87. Ex parte *Dufrene*, 1 V. & B. 54. 1 Rose, 333. Ex parte *Parton*, 15 Ves. 462.

³ 14 Ves. 87, in *Castell* and *Powell's* bankruptcy.

⁴ Ex parte *Freeman*, 1 V. & B. 39. *Watkins v. Maund*, 3 Camp. 309.

⁵ Ex parte *Rouge*, 4 Dea. 68.

⁶ *Backwell's* case, 1 Vern. 152.

⁷ 2 Ch. Ca. 191. Ex parte *Wilson*, 1 Atk. 213.

⁷ It was formerly the practice to enter *caveats* in the bankrupt office against the issuing of commissions, which was frequently productive of fraud; as by that means an opportunity was given to persons, against whom the commission was to be taken out, to make away with their effects. But ever since Lord Hardwicke expressed his disapprobation of the practice, the *caveat* fell into disuse. Ex parte *Parsons*, 1 Atk. 72.

the bankruptcy in the *Gazette*, without otherwise interfering with the progress of it; as where a person, against whom a fiat issues, states on oath that he is solvent, and has committed no act of bankruptcy, and offers to pay the amount of the petitioning creditor's debt into court.¹ But where there is a clear case of *fraud*, the court will then make an order to stay proceedings before adjudication, it being its duty to put an end to fraud, without loss of time.² as where an equitable creditor signed a composition deed with his debtor, and afterwards attempted to sue out a commission in the name of his trustee.³

Country fiats.] By 5 & 6 Vict. c. 122, s. 46, every fiat, not directed to the court of bankruptcy in London, must be directed to such one of the district courts in the country, as the lord chancellor, the master of the rolls, one of the vice-chancellors, or a master in chancery, acting under any appointment of the lord chancellor, by such fiat, may think fit to nominate; and such court is to proceed thereon in all respects as the country commissioners proceeded before the passing of the act, and to have all the power, jurisdiction, and authority, and be subject to the duty previously vested in or imposed upon such commissioners. By sect. 47, every country fiat and the proceedings under it, or any part of such proceedings, or copies or minutes of such fiat and proceedings, must be transmitted by the district court to the court of bankruptcy in London, to be there filed and kept among the records. And by sect. 56, the like sums are to be paid by the official assignee under a country fiat, as under a fiat prosecuted in London, to be placed by the accountant in bankruptcy to the like account, as is specified by the 1 & 2 Will. 4, s. 56.

Where there is a competition among the creditors for a *country*, and for a *town* fiat, the proper practice is to make a special application to the court of review, to direct that to issue which is most convenient for the general benefit of the creditors; and notice of the application should be given to the opposite party. A London fiat will be preferred, if it is probable that the bankrupt's property would otherwise be carried off;⁴ and if a country fiat has previously issued, the proceedings under it will be transferred to the court of bankruptcy in London, and a renewed fiat be ordered to issue.⁵

¹ *Ex parte Fletcher*, 1 Rose, 336.

² *Ex parte Battier*, Buck. 426.

³ *Ibid.*

⁴ *Ex parte Booth*, 3 M. & A. 627.

⁵ *Ex parte Gregory*, 2 M. D. &

D. 92.

But though the court will, when two dockets have been struck, direct that to be proceeded on, which is most for the convenience of the creditors at large, yet where a fiat has once issued, it will not be superseded, on the ground of its being inconvenient to any class of creditors, with respect to residence merely.¹ And where a fiat has been opened, and the bankrupt's examination has commenced, the venue will not be changed, without a clear proof of benefit to the estate, and that the change works no injustice to the bankrupt.² And, although a docket is struck improperly for a London fiat, a party applying for a country fiat is not entitled to an *ex parte* injunction to stay the issuing of the London fiat.³ It is not sufficient, in support of the application for a country fiat, (when it is opposed,) to state merely in the affidavit, that the major part in value of the creditors do not live within one hundred miles of London, but at a certain town in the country; the affidavit ought to be more particular, as to the respective amount of the London and the country debts.⁴

Where all the creditors lived in London, except two, a London fiat was directed instead of a country fiat, that had already issued;⁵ and on an affidavit that most of the creditors lived in London, as well as the witnesses to prove the act of bankruptcy, and that it was more beneficial for the estate that the fiat should be worked in London, a country fiat already issued was ordered to be transferred to a London commissioner.⁶ And for the same reason the direction of a country fiat will be altered to another district.⁷ But the venue of a fiat will not be changed, merely because the existing means of communication between the place of trading and the district court to which it belongs are not so convenient, as those between the place of trading and another district court.⁸

But the court will not order the fiat to be directed to a London commissioner, merely because a majority of the creditors reside in London,⁹ or because the petitioning creditor believes that fraud will be attempted to be practised against the London creditors.¹⁰ And where the object of the fiat was to set aside a fraudulent cognovit, and the witnesses

¹ *Ex parte Fellows*, 2 Mad. 141.

² *Ex parte Mitchell*, 3 M. D. & D. 397.

³ *Re Ings*, 2 M. & A. 671. 2 Dea. 8.

⁴ *In Re Child*, Buck. 425.

⁵ *Ex parte Johnson*, 1 Deac. & C. 221. *Re Gregg*, 3 Dea. 381.

⁶ *Re Snelling*, 2 Dea. 557.

⁷ *Re Johnston*, 2 Dea. 290.

⁸ *Re Oram*, 3 M. D. & D. 330.

⁹ *Ex parte Rawlinson*, 3 Dea. 585.
Ex parte Knowles, 4 Dea. 213.

¹⁰ *Ex parte Meeking*, 4 Dea. 51.

to prove its invalidity resided in the country, the court refused a London fiat, although the great majority of the creditors and the witnesses to prove the requisites lived in London;¹ and for the same reason a London fiat was ordered, when the witnesses to prove a fraudulent preference resided there.²

Any person, though he is *not a solicitor*, may sue out a fiat in bankruptcy.³

Description of bankrupt.] The bankrupt should, of course, be described by his *right name* in the fiat; but though there is a mistake in the spelling of the name, yet if it is *idem sonans*, the variance will not be material.⁴ And it was held no objection to a commission, that the bankrupt was described as *Robert MARTIN Jackson*, though his real name was only *Robert Jackson*, the name of *Martin* having been assumed by him.⁵ It seems that a joint fiat will not be annulled, on account of the misnomer of one of the bankrupts, by the omission of one of his christian names. To prove the existence of such a misnomer, it is not necessary to state that the party was baptised by and always adopted another name than that by which he is described; it must appear that he was generally known by such other name.⁶ But where there are *two* fiats issued, one by his *wrong* name, (though the very one he was in the habit of using,) and the other by his *right* one, the latter will be preferred.⁷ And where there is a doubt how the bankrupt spells his name, and the case is urgent, the court will make an order that the fiat shall issue against him, described with an alias,—thus: “*J. Stevenson*, otherwise *J. Stephenson*.”⁸ The omission to describe the bankrupt as *surviving partner*, when the fiat is sued out on a joint debt due from him and his deceased partner, does not seem to be important.⁹

The bankrupt's *place of abode*, as well as that where he may be more generally known, should also be correctly described in the fiat,—though, if he is well known by the description, a trifling mistake in this respect will not be material; such as describing his residence to be “of *Finsbury-square*, in the *city of London*,” instead of “the *county*

¹ Ex parte *Wainwright*, 4 Dea. 56.

² Re *James*, 4 Dea. 81.

³ Ex parte *Smith*, 19 Ves. 473.

⁴ Ex parte *Ward*, 1 Rose, 314.
In Re *Baldwin*, 2 Rose, 20.

⁵ Ex parte *Smith*, 2 Rose, 25.

⁶ Ex parte *Richards*, 2 M. D. & D. 493.

⁷ Ex parte *Schofield*, 2 Rose, 246; and see *Stevens v. Elizée*, 3 Camp. 256.

⁸ *Stevenson's case*, 19 Ves. 277.

⁹ In Re *Baldwin*, 2 Rose, 20.

of *Middlesex*.”¹ Or, where the misdescription is so slight, that no creditor is deceived by it.² But a commission against J. G., of Cophall *Buildings*, instead of Cophall *Court*,³ or against J. N., of A., in the parish of *Hope*, instead of the parish of *Tidswell*, has been held bad; and the same, where the bankrupt is described as of *two* places, when in fact he only belonged to *one*.⁴ Where the bankrupts were described as “late of the Kent-road, Coal Merchants,” and it appeared that they had quitted that trade more than two years before the issuing of the commission, and had since been separately engaged as farmers; it was held that the description was insufficient, and the commission was superseded.⁵ So, where a bankrupt had been for ten years keeper of two lunatic asylums at Edmonton and Stoke Newington, and afterwards took two rooms in an obscure place near Blackfriars'-road, at a weekly rent of 5*s.*, where he had his name painted on the shutter, as a druggist, which he only occupied for two months previous to the commission, and he was merely described as “of Surrey Row, Blackfriars'-road, Druggist,”—this was held to be a fraudulent description, and the commission was superseded.⁶ And the same, where the bankrupt carried on business in the town of Carnarvon, and he was described as of some obscure village in the county of Carnarvon, where he merely resided, and did not carry on any business.⁷

It is usual in practice to describe the bankrupt in the fiat, by the particular trade he was known to follow; though the terms “dealer and chapman,” or any thing tantamount, are alone sufficient.⁸ Thus, a scrivener has been held to be sufficiently described by the words “dealer⁹ and chapman;” and the general statement under those words, or that he “got his living by buying and selling,” will admit of any particular trading,¹⁰ or indeed of any other trading, though different from that specially mentioned in the fiat.¹¹ And when the general words “dealer and chapman” were altogether omitted, it was held that evidence might be given of any other trading than the one specified.¹²

¹ Ex parte *Smith*, 1 G. & J. 256.

² Ex parte *Mills*, 3 D. & C. 606.

³ In re *Gordon*, 1 Mont. Dig. 78.

⁴ Ex parte *Marston*, *ibid.*

⁵ Ex parte *Day*, Mont. & M. 208.

⁶ Ex parte *Shadbolt*, Mont. 89.

⁷ Ex parte *Morris*, 1 Dea. 498.

⁸ Ex parte *Herbert*, 2 Rose, 248.

2 V. & B. 399. *Hale v. Small*, 2 B. & B. 28.

⁹ *Kemp v. Neville*, 5 Moore, 23.

¹⁰ Ex parte *Herbert*, 2 Rose, 248.

¹¹ *Hale v. Small*, 2 B. & B. 25.

¹² *Hale v. Small*, 2 B. & B. 25.

4 Moore, 415, over-ruling S. C.

8 Taunt. 730. 3 Moore, 63. And

Amendment.] A fiat, before it is opened, is considered in the nature of an *escrow*, and a clerical error may be corrected; but the court will not permit the date or *teste* to be altered, in order to let in a subsequent act of bankruptcy or petitioning creditor's debt, where the petitioning creditor is unable to prove a debt or act of bankruptcy prior to the date of it.¹ A fiat, however, may be amended by altering the description of the petitioning creditor, so as to make it agree with that in the docket papers;² or by amending the description of the bankrupt's residence.³ Where a fiat is amended by inserting an addition to the description of the bankrupt, there must be a new docket; that is, the affidavit must be resworn.⁴ Where a commission had once been opened, it was formerly laid down as a strict rule, that it could not be *amended or resealed*, even to correct a mere clerical error; and that the only remedy was to supersede it, and issue another.⁵ But where the only error was that one of the commissioners' names was misspelt, the commission was ordered to be resealed, and the commissioners directed to adjudicate *de novo*.⁶ There does not, however, seem to be any great reason now for so inflexible an adherence to this rule; for the principle on which it appears to have been founded was, that any alteration of the commission would be a fraud upon the revenue laws; but now the *fiat*, as well as the *affidavit* and *petition*, are all exempted from any stamp duty. Another reason was also assigned for the rule, which was, that by resealing the commission, a party, against whom it had improperly issued, might be defeated of his right of action.⁷ But this reason, it is apprehended, will not apply to a trifling mistake or mere clerical error, in respect of which, without any other ground, a court of equity would hardly encourage a legal right of action. In one case, indeed where the commission had not only been opened, but had been in prosecution more than two years, the error having arisen from the *act of the officer* at the bankrupt-office, in not following the description

see *Ex parte Small*, 2 Wils. 85. *Bernasconi v. Farebrother*, 10 B. & C. 549.

¹ *Ex parte Cheesewright*, 1 Rose, 228. 18 Ves. 480. *Re Jacob*, 4 D. & C. 277. *Ex parte Shawe*, 2 Dea. 74.

² *Ex parte Jarvis*, 4 D. & C. 27.

³ *Re Humphrey*, 4 D. & C. 484.

⁴ *Ex parte Wing*, 3 M. & A. 61. *Ex parte Sutton*, 1 Rose, 85.

⁵ *Ex parte Thompson*, 9 Ves. 225. *Fisher's case*, 10 Ves. 190. *Burrow's case*, *ibid.* 286. *Ex parte Thwaites*, 13 Ves. 325. *Ex parte Lee*, 1 Cox, 394. *Ex parte Todd*, Mont. 455. 11 D. & C. 319. *Ex parte Rhanda*, 4 Dea. 124. *Ex parte Wakefield*, Mont. & M. 291.

⁶ *Re Stevenson*, Mont. 116. *Re Barber*, 2 G. & J. 81.

⁷ 10 Ves. 191.

in the affidavit for the docket, the lord chancellor ordered the commission to be made conformable to the affidavit,¹ saying, that in this case there was something to amend by. Such an amendment, however, has been refused, when the error was created by the *act of the solicitor*,² there being in this nothing to amend by.

When to be executed.] A fiat ought to be executed in a reasonable time after it is issued; and it is an abuse of it to delay the prosecution of it, with a view to another arrangement.³ By the 5 & 6 Vict. c. 122, s. 4, every fiat is now directed to be transmitted by the secretary of bankrupts, in such manner and at such cost as the lord chancellor by general order shall direct, to the court to which such fiat shall be directed, and is required to be forthwith opened, unless such court shall in its discretion think fit to postpone the opening. But, if it is not opened by the petitioning creditor within three days after it shall have been so transmitted, or within such extended time as shall be allowed by the court, such court may open it at any time within fourteen days then next following, upon the application of any other creditor to the amount required by the act to constitute a petitioning creditor, and adjudicate thereon, upon the proof of the debt of such creditor, and of the other requisites to support the fiat; and no fiat can now be issued to the petitioning creditor, or his attorney or agent.

By a general order of Lord Loughborough,⁴ when any *London* commission was not proceeded in for *fourteen days* after the date of it, or a *country* commission in *twenty-eight* days, either of them might be superseded. One day further, however, was to elapse before the order for the *supersedeas* could issue; and the application, which should be first made during that day for a new commission by any other solicitor, was to be preferred to an application from the solicitor who sued out the first commission. But by a subsequent order, this preference was not to be enforced against the same solicitor, when acting as *agent* for a different person from the one for whom he acted in suing out the first commission.⁵

In the construction of the first of these orders, the practice at the bankrupt office has been uniformly to supersede a *country commission* on the thirtieth day after it issued,

¹ *Ex parte Guthrie*, 1 G. & J. 245.

² *Ex parte Forshaw*, 1 G. & J.

368. *Re Stammers*, Mont. & M.
290.

³ *Ex parte Layton*, 6 Ves. 434.

⁴ 26th June, 1793.

⁵ General Order, 5th Nov. 1793.

upon an application made for that purpose on the twenty-ninth, unless *notice of the adjudication* was previously given at the office on the latter day; and where the adjudication did not take place until the twenty-eighth, and, by the course of the post from the place where the commission was opened, it was impossible that notice of the adjudication could reach London by the twenty-ninth, the lord chancellor refused to supersede a second commission, which had been taken out by another creditor.¹ When, however, the common order had been obtained to annul a fiat for want of prosecution, and for leave to issue another,—but before the order and the second fiat were delivered out of the office, notice was given that the first fiat had been opened on the twenty-ninth day,—the court allowed the first fiat to proceed, there being no *mala fides* in the party issuing it, upon condition however of his paying all the costs of the application for the second fiat, and of the motion to annul the first.² But, in general, a fiat should be executed *immediately*, without waiting to the utmost limit of the time allowed by the general order; and where it happens to be against *bankers*, there is a greater necessity for prosecuting it without delay.³ Therefore, where the petitioning creditor applied to supersede a commission against bankers, and issue another, on the ground that the act of bankruptcy was subsequent to the date of the commission,—and the solicitor had been required to state by affidavit why he took out a commission which he could not support,—and pending that application another creditor obtained a supersedeas, and also a fresh commission, under the apprehension of immediate extents;—the latter commission was preferred, though the bankruptcy was afterwards declared upon acts found previous to the date of the first commission.⁴ So, where the time for opening a fiat expired on the 22nd of May, but, there being some misstatement in the affidavit of the solicitor for the petitioning creditor, the solicitor, on the 19th of May, obtained an order for liberty to issue a new fiat; and on the 23rd of May, another creditor applied for a fiat; it was held, that this special order not having been acted on before the twenty-eight days expired for opening the first fiat, the second creditor was entitled to his fiat, with costs.⁵ But a fiat, omitted to be opened within the time limited by the general

¹ Ex parte *Henderson*, 2 Rose, 190; Ex parte *Westall*, 4 D. & C. 350.

² Ex parte *Saunders*, 2 Dea. 326.

³ Ex parte *Maror*, 19 Ves. 542.

⁴ Ibid.

⁵ Re *Scott*, 2 Dea. 406.

order, is not for that cause absolutely superseded, but only supersedable, in the event of another creditor taking out a second fiat.¹

Proof of an act of bankruptcy, followed up by the adjudication, it seems, is a sufficient *proceeding* within the terms of the general order; and it is not necessary that the advertisement of the adjudication should have appeared in the *Gazette* within the limited period; for the *Gazette* being only published twice a week, the adjudication may be frequently too late to be inserted within that period. It would be unreasonable, therefore, to hold, that nothing but advertisement of the adjudication would satisfy the terms of the order.² If a country fiat therefore is opened on the 28th day, it is a sufficient proceeding within the general order.³

The strictness of the general order may, under peculiar circumstances, be relaxed, where there is a *bonâ fide* intention to prosecute the fiat; as in the case of the sickness of a commissioner, or a witness.⁴ And although a fiat has been annulled for non-prosecution according to the terms of the order, and a second fiat actually issued by another creditor, yet he is not entitled to the second fiat as a matter of absolute right. For where, in a case of this kind, there was a *bonâ fide* intention of prosecuting the first commission, delayed only by the refusal of the witness (who could prove the act of bankruptcy) to attend the commissioners,—and notice had been given to the solicitor who struck the second docket, that a petition had been presented to compel the attendance of that witness, and that the commission was intended to be prosecuted,—the second commission, under these circumstances, was directed to be superseded, and the first commission to proceed.⁵ And in another case, where the commission was supersedable under the above order, and the solicitor, who took out a second commission, had previous notice that the first was to be proceeded in, Lord Eldon intimated his intention to have made the solicitor pay the costs, if the first solicitor had not in fact (under the apprehension that the first commission could not stand) himself taken out a fresh one.⁶

Where the adjudication was prevented, by the witness to prove the act of bankruptcy secreting himself, in con-

¹ Ex parte Smith, 3 D. & C. 761.

² Re Wood, 3 Dea. 514.

³ Ex parte Freeman, 1 Rose, 384. Ex parte Ellis, 7 Ves. 135. Ex parte Soppit, Buck. 81; but see ante, 120.

⁴ Ex parte Freeman, 1 Rose, 384.

⁵ Ex parte Freeman, 1 Rose, 380.

⁶ Ex parte Sanden, 1 Rose, 85.

cert with the bankrupt, the time has been enlarged from time to time, on an affidavit of the facts.¹ But it is no ground for granting further time, that the bankrupt had been negotiating for a composition with the general body of the creditors, whether the cause for opening the fiat has,² or has not,³ expired. Where an application is made to enlarge the time for opening a fiat, the application should be supported by an affidavit of a *bonâ fide* intent to prosecute it, that there is no collusion with the bankrupt, and that no composition-deed was in contemplation by the bankrupt with his creditors.⁴ But the court will not extend the time, on the mere ground of its being stated that the witnesses to prove the act of bankruptcy were on different journeys, and were not expected to return home before the time for opening would expire, when the application was not made until the time had nearly expired.⁵ Where the petitioning creditor, after issuing a fiat, found he could not support it, on account of his inability to prove the trading, the court refused to permit another petitioning creditor to issue a second fiat before the time for proceeding in the first was expired;⁶ and the same, where the petitioning creditor went abroad, after issuing the fiat.⁷

By a general order of Lord Thurlow,⁸ a petitioning creditor who had sued out one commission, and who had neglected to prosecute it, could not sue out another, without the special leave of the lord chancellor. But this rule does not render it imperative upon the court to annul the new fiat sued out without such leave.⁹ And where the time for opening the fiat is not expired, leave will be given to the petitioning creditor to annul it, if he find that he has not a good debt to support it;¹⁰ or to issue another fiat, to give effect

¹ In *Re Hayes*, 1 G. & J. 255. Ex parte *Fox*, 1 D. & C. 572.

² Ex parte *Dowton*, 1 Dea. & C. 111. *Re Moody*, 2 D. & C. 210. Ex parte *Stock*, 2 Dea. 328. Ex parte *Drew*, 2 M. D. & D. 68.

³ Ex parte *Castle*, 4 Dea. 273.

⁴ *Re Kearsley*, 2 Dea. 317.

⁵ Ex parte *Smith*, 3 D. & C. 762.

⁶ Ex parte *Clowes*, 3 D. & C. 493.

⁷ Ex parte *Medley*, 3 D. & C. 502.

⁸ 6th Dec. 1788. There is no printed or written copy of this

order; but it was made upon a petition of Sir Richard Arkwright, in the matter of *Gibson and Johnson*, and was a direction given by Lord Thurlow to Mr. Woodcock, the then secretary of bankrupts; and although the order never was published, yet it has invariably been acted upon at the bankrupt office. *Whitn. B. L.* 476; and see *Re Edwards*, 1 Dea. & C. 531.

⁹ Ex parte *Thomas*, 3 M. D. & D. 307.

¹⁰ Ex parte *Rogers*, 3 M. & A. 596.

to a more recent act of bankruptcy;¹ or to rectify a mistake in the affidavit;² but this cannot be done without permission of the court;³ and such permission has been refused, when no proceedings were had under a commission sued out a twelve-month before.⁴ Lord Eldon also directed, that a second commission should never be sent to him, without a note of what had been done in the first.⁵ Where there is great delay in executing a fiat, there arises necessarily a presumption of fraud;⁶ and though no other creditor apply to supersede it for want of prosecution, yet, after a considerable lapse of time, the court will not permit the petitioning creditor to proceed⁷ upon it. But where the delay arose from the bankrupt, and not from the petitioning creditor, a commission was in that case ordered to be opened near four months after it had issued.⁸ In such a case, however, the delay must be *against the will* of the petitioning creditor; for if the delay be wilful, it is not a sufficient excuse that it was at the request of the bankrupt, and with the concurrence of the creditors.⁹

A fiat, supersedeable under the above orders of Lord Loughborough,¹⁰ may be annulled by any persons (except the bankrupt or the petitioning creditor), as a matter of course,¹¹ by mere application at the bankrupt office; but the *bankrupt*¹² or the *petitioning creditor*¹³ cannot annul, without a petition; and where the bankrupt applies, the court will exercise its discretion on the subject.¹⁴ On the application of another creditor to annul a fiat, on the ground that it was not filed of record in the register's office nine days after its date, the court declined to annul the fiat, but permitted the creditor to take out another.¹⁵

The court will not order two different fiats to be worked before the same commissioner, merely because the accounts of the two bankrupts are intermixed, from bill transactions, with each other, where the application is made by the petitioning creditor under only one of the fiats.¹⁶

¹ Re *Crawley*, 3 D. & C. 251.
Ex parte *Llewellyn*, 2 M. & A. 298.
Re *Garrith*, 1 Dea. 278, *contrd.*

² Ex parte *Watton*, 1 M. D. and D. 309.

³ Ex parte *Ward*, 3 M. & A. 304.

⁴ Ex parte *Masterman*, 18 Ves. 298. 2 Rose, 442. Ex parte *Foljambe*, 3 Dea. 628; and see 1 Rose, 333 (note).

⁵ 1 V. & B. 34.

⁶ 1 Rose, 384.

⁷ Ex parte *Puleston*, 2 P. Wms. 545. Ex parte *Smith*, 1 Rose, 832.

⁸ *Harrison's case*, 3 V. & B. 174; and see Re *Mathews*, 1 D. & C. 35.

⁹ Ex parte *Luke*, 1 G. & J. 361.

¹⁰ 26th June, 1793.

¹¹ Ex parte *Gale*, 1 G. & J. 44.

¹² *Ibid.* 1 G. & J. 43.

¹³ Ex parte *Stokes*, 7 Ves. 408; and see ex parte *Thomson*, 1 Ves. 157.

¹⁴ Ex parte *Whipple*, 3 M. D. & D. 449.

¹⁵ Ex parte *Gerothwohl*, 4 Dea. & C. 48.

¹⁶ Ex parte *Hamilton*, 1 M. D. & D. 312.

SECTION II.

Of the general Effect of the Fiat.

A commission of bankrupt was formerly treated as an *execution* at law in the first instance;¹ and a fiat may still be considered in the nature of an execution, being a process for all creditors, legal and equitable, against a debtor's estate and effects, to which he is either entitled in his own right, or jointly with that of others.² It is, indeed, so far like an execution, that it may be issued against *one* only of several partners for a *joint* debt;³ but it differs from an execution in this respect, that whilst the latter only passes what the sheriff actually seizes, a fiat vests in the assignees all the rights and possibilities of the bankrupt, which he possessed at the time of its being issued.⁴ The property also taken under a fiat is not disposed of, like that seized under an execution, for the benefit of the *individual creditor* suing it out; but falls immediately under the administration of the bankrupt law, for the purpose of equitable distribution amongst⁵ *all* the creditors.

A fiat *before* it is opened, it has been already observed, is considered as a species of *escrow*;⁶ and *after* it is opened, it does not operate in abatement of any pending action or suit, brought either by or against the bankrupt; therefore, if he has commenced an action, without having any excuse for it, the fiat, though followed up by adjudication and subsequent proceedings, will not protect him against the consequences of such action. For the same reason, the fiat does not operate as a revocation of a submission by the bankrupt to arbitration, notwithstanding the award is not made till after the act of bankruptcy, on which the fiat is founded.⁷ But the other party may, if he chooses, revoke the submission; as the assignees are not bound by the submission of the bankrupt.⁸ If, however, the assignees attend meetings under the reference, and make no objection to the proceedings, they will be considered as adopting them, and be bound by them.⁹ A decree also of the court of chancery, for a receiver of the

¹ *Twiss v. Massey*, 1 Atk. 67.
Ex parte *Wilson*, *ibid.* 153.

² Ex parte *Stocks*, 3 V. & B. 107.

³ Ex parte *Crisp*, 1 Atk. 134.
Crispe v. Perritt, Willes, 467. Ex parte *Ackerman*, 14 Ves. 604. Ex parte *Deudney*, 15 Ves. 499.

⁴ Ex parte *Brown*, 2 Ves. 68; and see *Lee v. Lopes*, 15 East, 230.

⁵ Ex parte *Ellon*, 3 Ves. 239.

⁶ *Fisher's case*, 10 Ves. 190.

⁷ *Andrews v. Palmer*, 4 B. & A. 250.

⁸ *Marsh v. Wood*, 9 B. & C. 659.

⁹ *Dod v. Herring*, 1 Russ. & M. 153.

bankrupt's estate, is not superseded by a fiat; for the appointment of a receiver is a discretionary power, which is exercised by the court merely provisionally, and does not affect the rights of parties.¹ Neither are proceedings in insolvency superseded by a subsequent fiat.²

A fiat does not work a forfeiture, under a general clause in a lease or a will against alienation; for bankruptcy, being an assignment by *operation of law*, is considered not an alienation within the meaning of such a restraint, which is confined to direct and voluntary alienation by the *act of the party*.³ Neither does a fiat operate as a complete revocation of a devise of real estate; for the law takes the property out of the bankrupt only for the purpose of paying his creditors; and as soon as that is done, the assignees under the fiat are then mere trustees for the bankrupt, and can be called upon to convey to him.⁴

A fiat renders invalid and nugatory⁵ all payments and contracts of the bankrupt, where the party dealing with him had notice of any prior act of bankruptcy committed by him.

The mere issuing of a fiat, however, without any thing further done under it, does not affect the rights or property of the person who is the subject of it, or of any person who may be connected with him. Therefore, a prior fiat, which has never been acted upon, (though it has not been superseded,) will not invalidate a second fiat, which has been regularly proceeded with; the first being considered as never in legal operation.⁶

If the person against whom a fiat is issued dies *before* adjudication, it then abates and becomes absolutely void; notwithstanding the commissioner may have so far dealt with it as to have received proof of the petitioning creditor's debt, and the trading; for the party must be *declared* a bankrupt, *before his death*, to authorize any further proceedings;⁷ but if he dies *after* adjudication, in that case the commissioner may proceed as if he were living.⁸ And a fiat will not abate by reason of a demise of the crown.⁹

¹ *Skip v. Harwood*, 3 Atk. 564.

² *Sidebotham v. Barrington*, 3 Bea. 524.

³ *Doe v. Bevan*, 3 M. & S. 353. *Wilkinson v. Wilkinson*, G. Cooper's Cases, 259; and see post, "Assignment."

⁴ *Charman v. Charman*, 14 Ves. 580.

⁵ 2 & 3 Vict. c. 29; and see post, "Relation."

⁶ *Wurner v. Barber*, 8 Taunt. 176. 2 Moore, 71. Ex parte, *Buller*, 1 Rose, 136.

⁷ Ex parte *Beale*, 2 V. & B. 29. Ex parte *Green*, 1 D. & C. 230.

⁸ 6 G. 4, c. 16, s. 26. *Beasley v. Beasley*, 1 Atk. 97. Ex parte *Dewdney*, 15 Ves. 494. *Doe v. Clark*, 5 B. & A. 458.

⁹ Section 26.

By 1 & 2 Vict., c. 110, s. 39, (one of the numerous Insolvent Acts,) a fiat issuing upon the particular act of bankruptcy, specified in that statute,—viz. filing a petition to be discharged from custody as an insolvent debtor,—has, after adjudication, the effect of avoiding any conveyance of the estate of the insolvent under that statute.¹

SECTION III.

Of a Second Fiat.

A *second* fiat issued against a bankrupt, before he has got his certificate under the first, (provided the first has been put into legal operation) is, strictly speaking, void at law; for an uncertificated bankrupt is incapable of trading, or contracting *effectually*, for his own benefit,—all the property he acquires being vested in his assignees.² A commissioner, therefore, is justified in refusing to adjudicate upon such a fiat.³ Two fiats cannot subsist together for the same purpose; and in general the second will be annulled, though this is not a matter of course.⁴ For the lord chancellor, and subsequently the Court of Review, have always been accustomed to exercise a discretion on the subject, and support that commission or fiat which was most convenient, by superseding the other.⁵ Thus, where a commission issued in 1823, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the court refused, under the circumstances, to supersede the fiat.⁶ So, where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud.⁷ And we have just seen that a fiat, which has not been put into any legal operation, will not invalidate a second fiat; for no

¹ See ante, p. 80.

² Ex parte *Proudfoot*, 1 Atk. 251. *Martin v. O'Hara*, Cowp. 823. Ex parte *Brown*, 2 Ves. 67. 4 Bro. 210. Ex parte *Bold*, C. B. L. 12. Ex parte *Leicester*, 6 Ves. 429. *Everett v. Backhouse*, 10 Ves. 54. Ex parte *Martin*, 15 Ves. 114. *Butt v. Bilke*, 4 Pri. 240. *Till v. Wilson*, 7 B. & C. 684. *Nelson v. Cherrell*, 7 Bing. 663. *Wheeler v. Hopwood*, 1 B. & Ad. 621.

³ Re *Chambers*, 2 Dea. 404. But see Ex parte *Addison*, 3 Dea. 61.

⁴ Ex parte *Devas*, 1 M. & A. 420.

⁵ Ex parte *Layton*, 6 Ves. 434. Ex parte *Hardwicke*, *ibid.* Ex parte *Lees*, 16 Ves. 472; and see ante, 125, and post, "Supersedes."

⁶ Ex parte *Devas*, 4 D. & C. 366.

⁷ Ex parte *Westall*, 4 D. & C. 350.

property *actually* passes under a fiat before assignees are chosen.¹

Under some special circumstances, also, as where there was fraud, or *laches*, in the creditors under the first commission, the lord chancellor has refused to supersede a second commission, notwithstanding the first has been prosecuted to a certain extent; as where it appeared that the creditors under the first had signed the certificate under the second, and acquiesced under it for a considerable time.² And so, where fifteen years had elapsed since a first commission, during all which time the bankrupt (who was the son-in-law of the petitioning creditor under the first commission) had been permitted to carry on trade in another place.³ And where the creditors under a first commission had, by a contract of composition, placed themselves in such a situation as to prevent the legal operation of the commission, Lord Eldon said, he would not suffer them to defeat the fair claim of creditors under the second commission.⁴

But where A. had issued a fiat, and B., under the pretence of coming into a proposed arrangement with other creditors, protracted the prosecution of the fiat over the fourteen days, and then applied for a new fiat, and to supersede the first; the court in this case sustained the first fiat, and said that if a second fiat had issued, they would have superseded the second, and ordered the first to stand.⁵

With respect to a *third* commission or fiat, it was formerly held, that such a commission was sustainable against a bankrupt, although he had not paid 15s. in the pound under the second.⁶ But now, by virtue of the 127th section of the 6 Geo. 4, c. 16, all his *future estate and effects* are in such a case declared to be *vested in the assignees under the second fiat*; and therefore, there would, generally speaking, be no property left, upon which a *third* fiat could possibly operate.⁷ A third commission has indeed in some cases been decided to be absolutely void⁸ at law; although Lord Brougham, in one case, refused to supersede such a commission.⁹ And in another case, where the bankrupt had, between the time of obtaining his certificate under the

¹ Ante, p. 133.

² Ex parte *Proudfoot*, supra; and see ante, 129, et seq.

³ Ex parte *Lees*, 16 Ves. 472.

⁴ Ex parte *Bullen*, 1 Rose, 134;

and see Ex parte *Grew*, 16 Ves. 236.

Ex parte *Rhodes*, 15 Ves. 543.

Ex parte *Baker*, 1 D. & C. 533.

⁶ Ex parte *Baker*, 1 Rose, 452.

Ex parte *Hodgkinson*, 2 Rose, 172. G. Coop. 99.

⁷ Ex parte *Robinson*, 1 Mont. & M. 44.

⁸ Ex parte *Lane*, Mont. 12. *Fowler v. Carter*, 10 B. & C. 427.

⁹ Ex parte *Walsh*, Mont. 276.

second commission, and the issuing of a subsequent fiat, carried on business to a considerable extent, and was possessed of property, which might at any time have been made available in satisfaction of the debts proved under the second commission; it was held that, under these circumstances, the fiat was not void; as such after-acquired property had been suffered to remain in the possession of the bankrupt, as reputed owner, and was therefore such as the fiat might operate upon, by virtue of the 72nd section of the 6 Geo. 4, c. 16.¹

Where a *sequestration in Scotland* was awarded against a party domiciled there, and a commission of bankrupt was issued against the same party, by reason of his being domiciled also in England, the sequestration was held to have the preference, if the petition for the sequestration was before the issuing of the commission,—notwithstanding the act of bankruptcy in England was committed before the petition for the sequestration, and the latter was not finally awarded till after the issuing of the commission.²

Where a fiat is lost, and a party does not choose to rely on secondary evidence of its existence, the proper course is to issue a fresh fiat, and not a duplicate fiat.³

SECTION IV.

Of a Joint Fiat.

It was formerly the practice, where there were several partners,⁴ to take out separate commissions against each, as well as a joint commission against all; for it was holden, that a *joint creditor* could not avail himself of any distribution of the property of one partner under a *separate commission*.⁵ This practice, however, has been long exploded; as it created great confusion and expense with regard to the effects of the bankrupt, and was indeed in itself unreasonable and inconsistent—a second commission against the same individual, pending the working of the first, being held to be void at law.⁶ It has now therefore been some time settled, that a *joint creditor* can not only prove his debt under a

¹ *Butler v. Hobson*, 5 Scott, 824.
S. P. Benjamin v. Belcher, 11 Ad.
 & E. 350. And see *Summers v.*
Jones, 3 M. & A. 400.

² *Geddes v. Mowat*, 1 G. & J.
 414.

³ *Ex parte Levett*, 3 D. & C. 567.

⁴ And see post, "Partners."

⁵ 1 Atk. 138.

⁶ Ante, 126. *Ex parte Baudier*,
 1 Atk. 98. *Ex parte Cook*, 2 P.
 Wms. 500.

separate commission or fiat, but may also himself sue out a *separate* fiat against any one of several partners.¹ But he could not, before the 6 Geo. 4, c. 16, s. 16, sue out a commission against *two* of *three* partners,² any more than an action at law on a bond can be sustained against two out of three joint and several obligors, which must either be brought against *all jointly*, or *each one separately*. Under a joint commission, also, it was necessary that *each* of the partners included in it should be found bankrupt; for a commission, void as to one partner, was not sustainable against another. Thus, where one partner was dead at the time a joint commission was taken out, it was held to abate, and be absolutely void;³ though, as we have seen, this is not the case where he does not die till after the adjudication.

To remedy in part the above inconvenience, it was provided by the 16th section of the 6 Geo. 4, c. 16, (which continues the provision of the 3 Geo. 4, c. 81, s. 8,) that a joint creditor may sue out a commission against *one or more* partners of a firm, though it does not include *all* the partners; and that in any commission against two or more partners, the lord chancellor may supersede it as to one or more, without affecting its validity as to any partner, against whom it is not ordered to be superseded. And though a joint commission against two partners was invalid in its concoction, on the ground that one had not committed an act of bankruptcy, yet it was held to be supersedable as to him, without prejudice to its validity as regarded the other.⁴ But where a joint fiat issues against two on the separate debt of one, it is absolutely void, and the subsequent annulling it as to one cannot make it good as a separate fiat is to the other.⁵ And where a commission issued against two partners, and a subsequent commission against one of those two conjointly with three other persons, Lord Lyndhurst and Sir A. Hart refused to supersede the first commission as to one of the two partners, in order to give effect to the second; as this would be depriving one class of creditors of their legal right to a commission, upon the ground of the convenience of another class.⁶ Notwithstanding the above provision in the statute, it is still apprehended,

¹ 1 C. B. L. 9. *Crispe v. Perritt*, Willes, 467. Ex parte *Dewdney*, 15 Ves. 490.

² *Allan v. Hartley*, C. B. L. 7. *Allen v. Downes*, Willes, 474, note (q). Ex parte *Layton*, 6 Ves. 434. Ex parte *Henderson*, 4 Ves. 163; and see *Streatfield v. Halliday*, 3 T. R. 433.

³ *Beasley v. Beasley*, 1 Atk. 97. Ex parte *Martin*, 15 Ves. 115.

⁴ Ex parte *Bygrave*, 2 G. & J. 391. Re *Coleman*, Mont. & M. 15; and see ex parte *Wray*, Mont. & M. 195.

⁵ Ex parte *Clarke*, 1 D. & C. 544. Ex parte *Veysey*, 3 M. D. & D. 420.

⁶ Ex parte *Burlton*, 2 G. & J. 344.

that, where a joint fiat is void as to one partner,—as where one dies before¹ adjudication—it cannot operate against the other at law, unless it has been previously annulled, as to the partner against whom it was void, pursuant to the authority given by the above section.²

A joint commission has been sustained, on a debt contracted many years after a nominal dissolution of a partnership, where the sale of goods, which were the joint property of the partners, was continued after such dissolution.³

Although a joint fiat is, in strictness of law, a nullity, as to those partners against whom separate fiats have been previously issued, yet, if it can be made to appear that the estate of the bankrupts will be benefited by prosecuting the joint fiat, the court will, in the exercise of its discretion, supersede or suspend the prior separate fiats, and order the joint fiat alone to be proceeded with, under which latter fiat the assignees can, at law, recover both the joint and separate estates; and the same distribution will be then made, as if both the joint and separate fiats were permitted to stand.⁴ But this discretion will be only exercised, where it is clear that more ample justice can be obtained under the joint fiat.⁵ It is not, however, a sufficient objection to superseding a separate fiat, that a separate creditor to a great amount will by that means be divested of his right of voting in the choice of assignees,⁶ or that the separate estate is more important than the joint estate, and that one of the bankrupts intends to dispute his bankruptcy.⁷ But the court will not annul a separate fiat to give effect to a subsequent joint one, on the ground that the only witness to prove the act of bankruptcy is kept out of the way; nor will an order, for such cause, be made for the inspection of the proceedings under the separate fiat, but merely an order to enlarge the time for opening the joint fiat.⁸ Neither is a prior separate commission, issued in Ireland against one of two partners, a ground for superseding a joint fiat issued against them in this country.⁹

When a prior separate fiat is annulled to give effect to a

¹ *Ex parte Green*, 1 D. & C. 230.

² See *Hogg v. Bridges*, 2 Moore, 22. And see *ex parte Clarke*, 1 Dea. & C. 544.

³ *Backhouse v. Tarleton*, 2 Star. Ev. 143, cit., 2 Swanst. 571; and see ante, p. 35, note 1.

⁴ *Ex parte Hardcastle*, 1 C. B. L. 9. 1 Cox, 397. *Ex parte Martin*,

15 Ves. 115. *Ex parte Smith*, 1 G.

& J. 256. *Ex parte Bonbonus*, 8 Ves. 540. *Ex parte Gardner*, 1 Ves. & B. 74.

⁵ *Ex parte Rawson*, 1 V. & B. 160.

⁶ *Ex parte Pachelor*, 2 Rose, 26.

⁷ *Ex parte Burdikin*, 2 M. D. & D. 187.

⁸ *Ex parte Burdikin*, 1 Dea. 57.

⁹ *Ex parte Cridland*, 2 Rose, 164.

subsequent joint one—as this proceeding is not a matter of strict right, but for the convenience and general advantage of all the creditors—it is deemed but just, that the petitioning creditor under the separate fiat should be indemnified for the expenses of this proceeding. Therefore, unless he has been acting *malâ fide*, he receives all the costs of annulling the fiat out of the joint estate.¹ And when a separate fiat is thus annulled, every thing done under it falls with it. Thus, where a joint and separate creditor sued out a separate commission, and proved his debt under it, he was held, upon the *supersedeas*, to be restored to his right of election to prove against the joint estate, and to have a right, also, to elect, out of which estate he would be paid the costs of the *supersedeas*.² When, however, a separate fiat is taken out *after* a joint one, and after the petitioning creditor has previous notice of the joint fiat, in this case, the separate fiat will be superseded at the expense of the petitioning creditor.³

But though it lies in the discretion of the court to annul a prior separate fiat, and this in any stage of the proceedings, and whether the bankrupt has got his certificate under it, or not,⁴ yet where assignees have been appointed, or sales of the effects have taken place, and a dividend declared, or the bankrupt's certificate has been brought into the office for allowance, the court will then sometimes, in preference to annulling the separate fiat, direct it to be impounded in the bankrupt office.⁵ By this mode of proceeding, whilst full effect is given to the working of the subsequent joint fiat, the sales and certificate under the separate one are, at the same time, prevented from being rendered invalid. And generally, where superseding the separate fiat might prejudice transactions that have taken place under it, the court will, if the convenience of administering the partnership fund makes it better that the joint fiat should stand, so dispose of the first fiat (without superseding it), as to prevent its being an impediment to the prosecution, or validity, of the subsequent joint fiat,⁶—as by incorporating the proceedings under the previous separate fiat with those

¹ Ibid. Ex parte *Brown*, 1 Rose, 432. 1 V. & B. 60. Ex parte *Burdickin*, 1 M. D. & D. 156. Ex parte *Duncan*, 1 M. D. and D. 149.

² Ibid.

³ Ex parte *Mason*, 1 Rose, 423.

⁴ Ex parte *Cutten*, Buck. 68. Ex parte *Poole*, 2 Cox, 227. Ex parte *Gillam*, Ibid. 193.

⁵ Ex parte *Rowlandson*, 1 Rose, 416. Ex parte *Tobin*, 1 V. & B. 308. 1 Rose, 431, note (a). Ex parte *Rawson*, 1 V. & B. 160. Ex parte *Digby*, 1 Dea. 341. Ex parte *Ravenscroft*, 4 Dea. 172.

⁶ Ex parte *Mason*, 1 Rose, 433. Ex parte *Wilson*, Buck. 52.

upon the joint fiat.¹ And where an order of this kind is made, the commissioner is bound to admit the proofs, as they stand under the separate fiat, and cannot insist on a creditor deducting the amount of a dividend received by him under the separate fiat, and proving only for the balance of his debt under the joint fiat.² Even a court of law has exercised a species of equitable jurisdiction in this respect; as where the assignees under a prior separate commission obtained a verdict against a defendant,—upon its appearing that there was a subsequent joint commission, it was ordered that the money should be paid into court, until a petition to supersede the separate commission then pending had been decided.³ The assignees under a previous separate fiat are bound to produce the proceedings under that fiat at the opening of a subsequent joint one, for the purpose of proving the act of bankruptcy.⁴

Under some circumstances, however, the joint fiat will be annulled, and the separate one preferred; as where a joint fiat has not been taken out for *five months after* a separate one has issued, and there does not appear to be any joint effects.⁵ And a separate fiat will not be superseded upon the petition of joint creditors, if they suffer a considerable time to elapse, without obtaining an order to prove, for the purpose of assenting to, or dissenting from the certificate,—and more especially, if the certificate under the separate fiat is actually lying for confirmation, and no misconduct is imputed to the bankrupt.⁶ And where a separate commission was sued out against one of two partners, who was adjudged a bankrupt, and then the other partner died before assignment, and afterwards a second commission was taken out against the bankrupt partner, describing him as *surviving* partner,—the first commission was supported in preference to the second, the adjudication being considered as the act which severed the partnership.⁷ Where, also, two separate fiats, without any joint fiat, had issued against two partners, they were allowed to be consolidated, and prosecuted as one joint fiat.⁸

A separate commission was refused to be superseded to give effect to a subsequent joint one, where the bankrupt

¹ Ex parte *Lister*, 3 Dea. 516.

⁵ Ex parte *Rowlandson*, 1 Rose,

² Ex parte *Bateson*, 1 M. D. & D. 500.

89. Ex parte *Humper*, 17 Ves. 403.

³ *Hodgkinson v. Travers*, 1 B. & C. 257.

⁶ Ex parte *Cutten*, Buck. 58.

⁷ Ex parte *Smith*, 5 Ves. 295.

⁴ Ex parte *Sharp*, 2 M. D. & D. 350.

⁸ Re *Gower*, 1 M. D. & D. 1.

had committed a felony, by not surrendering to the separate commission,¹ and where the omission to surrender did not proceed merely from mistaken advice, nor from any extenuating circumstances. But, under such last mentioned circumstances, and where it appeared also that the bankrupt had surrendered, and passed his examination under the joint commission, Lord Eldon superseded the separate commission, upon the petition of the bankrupt, even after a prosecution had been instituted against him.²

Under a joint fiat, it is the practice of the court to make an order, (which may be obtained without a petition,) that the assignees shall keep distinct accounts of the several estates, and that the separate creditors may come in and prove their debts.³ And if any proceedings have been had under a separate fiat which has been annulled, they are generally ordered to form part of the proceedings under the joint fiat, and the proofs taken under the former fiat are directed to be received as proofs under the other.⁴

Under the provisions of the 6 Geo. 4, c. 16, s. 17, where a fiat is issued against two or more members of a firm, and afterwards another fiat is issued out against any other of the partners, the same commissioner should execute both fiats; and after the adjudication under the second fiat, the bankrupt's estate will vest in the assignees chosen under the first fiat, and all separate proceedings under the second must be stayed; and the second fiat, without affecting the validity of the first, must be annexed to and form part of the first. But the Court of Review may order the second fiat to be prosecuted before any other commissioner, and to proceed either separately, or in conjunction, with the first fiat. Notwithstanding this section only applies to existing partnerships, yet it has been determined that a separate fiat issued against one of several partners, after a joint fiat issued against the others, must be directed to the same commissioner, although the partnership had been dissolved.⁵ And where a separate fiat is issued against one partner, after a joint fiat against the other partners, the commissioner must proceed under the several fiats, as they are brought before him; since it is impossible for him to know beforehand which, in the result, will be available.⁶

¹ *Ex parte Roberts*, 2 Rose, 378.

² *Ex parte Lavender*, 18 Ves. 18.

³ 1 Rose, 55.

⁴ 1 Atk. 138.

⁵ *Ex parte Tobin*, 1 V. & B. 308.

Ex parte Upham, 17 Ves. 212. And see *Ex parte Bateson*, ante, p. 140.

⁶ *Re Simmons*, 2 M. D. & D. 603.

Ex parte Pryce, 2 G. & J. 161.

Renewed and auxiliary fiats.] The provisions of the 5 & 6 Vict. c. 122, s. 85, as to the auxiliary jurisdiction of the different courts authorized to act in the prosecution of fiats, have now rendered it unnecessary to issue any *renewed or auxiliary fiats*.¹

SECTION V.

Remedy where the Fiat is maliciously sued out.

By the 6 Geo. 4, c. 16, s. 13, if the commission was issued fraudulently or maliciously, and without foundation, the lord chancellor might, upon the petition of the person against whom it was taken out, order satisfaction to be made to him for the damages sustained, and for the better recovery thereof might assign the petitioning creditor's bond² to him; upon which he might afterwards sue in his own name. But now by the 5 & 6 Vict. c. 122, s. 3, the bond may be dispensed with; and since the passing of that statute, the practice of taking a bond from the petitioning creditor has been discontinued. The former law on this subject, therefore, as to the assignment of the bond, and the right of action on it by the petitioning creditor, has now become obsolete.

But notwithstanding the above provision in the statute for the assignment of the bond, the party, against whom a commission was maliciously sued out, was not deprived of his common law remedy by an action on the case against the petitioning creditor; and this mode of proceeding indeed afforded sometimes more satisfactory redress to the injured party, than an action on the bond,—inasmuch as a jury were not limited to the amount of the penalty of the bond, but might give any damages which they might think the plaintiff was justly entitled to.³ A bankrupt, therefore, has still a right of action on the case against a petitioning creditor, for maliciously suing out a fiat against him. But in such an action the solicitor should not be joined as a defendant, unless he has exceeded the bounds of his professional duty.⁴

Whenever the circumstances of the case will justify the action, the court of review will order the fiat and the pro-

¹ See post, Ch. 7, Sect. 1.

² Ex parte Perry, 1 Rose, 12.
Ex parte Scott, Ibid. Ex parte Upham, 17 Ves. 212.

³ Brown v. Chapman, 3 Burr.

⁴ Chapman v. Pickersgill,

2 Wils. 145. Bonham's case, 8 Rep.

121. Wydom's case, 14 Ves. 90.

91. Ex parte Fletcher, 1 Rose, 454.

⁴ Smith v. Gainsford, 1 Rose,

148, n.

ceedings under it to be produced at the trial of any action or indictment, that may be brought against the petitioning creditor, or other party implicated in suing out the fiat, and will permit the bankrupt, or his solicitor, to take such copies of them as they shall be advised.¹ But a judge, it seems, has no authority to make an order for the bankrupt to inspect and take copies of the proceedings, notwithstanding they may remain in the hands of the attorney who sued out the fiat.² The allegation in any such action, that the fiat was duly annulled, can only be sustained by the production of the lord chancellor's order for annulling the fiat, which order, by the 1 & 2 Will. 4, c. 56, s. 19, is declared to have all the force and effect of a writ of *supersedeas*. It is a fatal variance, to allege that the defendant sued out a fiat *out of the high court of chancery*; for the fiat does not issue out of the court of chancery, though signed by the lord chancellor,—but by virtue of the act of parliament³ giving special jurisdiction to the lord chancellor in matters of bankruptcy.⁴

Where it appeared that persons had conspired together in the issuing of a fraudulent commission, Lord Eldon directed the necessary documents to be laid before the attorney-general, with a view to the institution of criminal proceedings against the parties.⁵ But the offence may also be prosecuted either by indictment, or information, without recourse to the attorney-general.⁶ Where an indictment averred, that the defendants conspired fraudulently to sue out, without any just cause, a commission against the bankrupt; and it appeared that the real object was to dissolve a partnership between the prosecutor and the bankrupt, Lord Tenterden held, that the averment of fraud in the indictment did not relate to the improper object of the commission,—for that this was only cognizable by the chancellor,—but that the prosecutor must prove that the commission itself was fraudulent, as being sued out on a pretended debt, trading, or act of bankruptcy.⁷

¹ Ex parte *Warren*, 1 Rose, 276.
² 19 Ves. 162.

³ Ibid.

⁴ 1 & 2 W. 4, c. 56, s. 12.

⁵ And see *Poynton v. Forster*,
 3 Camp. 58.

⁶ Ex parte *Emery*, Buck. 422.

⁷ Ex parte *Cawthorn*, 19 Ves.
 260.

⁸ *R. v. Hawes*, K. B. Westm.
 Sitt. after T. T. 1828.

CHAPTER VI.

OF THE MEETING TO OPEN THE FIAT.

By the general order¹ of 12 January 1832, upon the application for an appointment for opening a fiat directed to the court of bankruptcy in London, the registrar, in the presence of the solicitor applying for the same, is to allot the fiat by ballot to one of the commissioners; except in cases of second or renewed fiats, which are to go to the same commissioner before whom the former fiat was prosecuted; and upon the making of such appointment, the registrar, in the presence of the solicitor, is required to write upon the face of the fiat the name of the commissioner before whom it is to be opened, and before whom it must be afterwards prosecuted, unless otherwise specially ordered by the court of review.

And we have seen,² that by the 5 & 6 Vict. c. 122, s. 4, every fiat is required to be forthwith opened, unless the commissioner shall in his discretion think fit to postpone the opening; and if not opened within three days after the transmission of the fiat to the commissioner, or within the further time allowed, then it may be opened within fourteen days then next following, upon the application of any other creditor to the amount required to constitute a petitioning creditor. But, by the general order,³ a London fiat cannot be opened, upon the application of any other creditor, until after three days from the date of filing the same in the office of the chief registrar in Basinghall Street,—nor a country fiat,⁴ until after three days from the date of registering the same by the deputy registrar of the district court.

Every application by a petitioning creditor to extend the time for opening the fiat, must be supported by affidavit, to be filed in court;⁵ and where the time is extended by any district commissioner, he must cause notice to be sent by post to the secretary of bankrupts of the extended time allowed.⁶ The

¹ Rule xi., and seq. See vol. 2, vol. 2, App., and 3 M. D. & D. Appendix; and see 1 Deac. & C. App. xxv.

² Ante, p. 127.

³ 12 Nov. 1842. Rule 3. See

⁴ Rule 5 *ibid*.

⁵ General order 12 Nov. 1842.

Rule 9.

⁶ *Id*. Rule 10.

petitioning creditor—or if there is more than one, then all of them—must attend in person¹ before the commissioner to prove the debt or debts upon which the fiat has issued, except upon special cause proved to the satisfaction of the commissioner.² And before the commissioner declares the party bankrupt, he is required to enter on the proceedings a deposition of the petitioning creditor, stating the nature and amount of the consideration, and the time of accruing of the debt. The attendance of the petitioning creditor should not be dispensed with, merely on the ground of his attendance being inconvenient to himself,³ as where he resides at a distance of 47 or 85⁴ miles from the place where the fiat is opened; though where he resided 200⁵ miles off, or even 110 miles,⁶ such an indulgence has been granted.⁵ But where the party is so ill or so infirm that he cannot attend but at the hazard of his life, then, upon a proper affidavit of a medical man, his personal attendance may be dispensed with, and the commissioner may receive an office copy of the affidavit made on striking the docket, in proof the debt.⁷ And in one case, where the petitioning creditor had been detained in London a week, on account of the commissioners not having been able to attend to open the commission, and he was called by important business into the country, a similar indulgence was granted.⁸ If the petitioning creditor should die between the issuing and the opening of the fiat, his executors then will be permitted by a special order to prove the debt.⁹

The witnesses to prove the trading and the act of bankruptcy must also personally attend¹⁰ before the commissioner. The personal attendance, however, of a witness may be, under special circumstances, dispensed with; as where a separate commission had issued against a party under which he was found a bankrupt, and afterwards a joint commission was taken out against him and his partners, and the only

¹ See general order of Lord Loughborough, 26th Nov. 1798, post, vol. 2; and see 17 Ves. 415.

² General order 12th Nov. 1842, Rule 12. Ex parte *Wright*, 3 M. D. & D. 320.

³ Ex parte *Williamson*, 1 Jac. & W. 240.

⁴ Ex parte *Cox*, 1 Deac. & C. 205.

⁵ Ex parte *Ross*, 1 Dea. & C. 552.

⁶ Ex parte *Freeman*, 3 M. & D. 33.

⁷ Ex parte *Edwards*, 8 Ves. 318. Re *Wood*, Mont. 509.

⁸ Re *Graham*, Buck. 47.

⁹ Ex parte *Winwood*, 1 G. & J. 252. Ex parte *Tanners*, Mont. & M. 292, note.

¹⁰ Ex parte *Allnut*, 1 C. B. L. 105. Ex parte *Edwards*, *Ibid*.

witness, who could prove the act of bankruptcy against him, was in Cumberland upon business of importance,—the Lord Chancellor in this case permitted the commissioners to receive an affidavit of the act of bankruptcy, made by the witness before a master extraordinary, upon being informed that the joint commission was directed to the same commissioners as the separate one.¹ But in another case, where the application was opposed by the bankrupt, such an order was refused.² No witness, who was a creditor, was formerly admissible to prove the requisites. Neither could the wife of the bankrupt be examined for this purpose.³ But now by 6 & 7 Vict. c. 85, a creditor, as well as the bankrupt's wife, it is conceived, would be competent witnesses. And it seems, that where there is a valid objection to the competency of a witness, if it be not taken before the commissioner prior to the adjudication, it cannot afterwards be urged as an objection to the proceedings under the fiat.⁴

As to the authority of the commissioners in enforcing the attendance of the witnesses to prove the trading and the act of bankruptcy, see post, Chap VII., Sect. IV. & V.

Where the act of bankruptcy consists in *lying in prison*, the usual proof of it before the commissioner is, by producing the certificate of the clerk of the papers signed by him, and proved by a witness who can depose to his signature.⁵

The evidence produced at the meeting to open the Fiat being all *ex parte*, it is both the practice and the duty of the commissioner to inquire minutely into the fairness of the petitioning creditor's debt, and the manner in which it arose, as well as into the facts of the trading, and the act of bankruptcy.⁶ And if the result of the inquiry affords to his mind sufficient evidence, (for he is not bound to believe all that is sworn),⁷ that the party has become bankrupt within the intent and meaning of the statute, he is then required to adjudge⁸ him a bankrupt accordingly,—that is, to declare generally,⁹ that he became bankrupt before the date and suing forth of the fiat; and he then signs an adjudication to that effect.¹⁰ The

¹ In re *Wood*, 1 Rose, 298. Ex parte *Bousman*, 1 M. D. & D. 90.

² Ex parte *Rowe*, 2 Rose, 389.

³ Ex parte *James*, 1 F. Wms.

611.

⁴ Ex parte *Lane*, 1 Mont. Dig.

89. Ex parte *Hills*, Mont. & M. 273.

⁵ 1 Mont. B.L. 403.

⁶ 1 C. B. L. 103.

⁷ Ex parte *Simpson*, 1 Atk. 71.

⁸ 6 G. 4, c. 16, s. 24.

⁹ *Bromley v. Goodere*, 1 Atk. 78.

Ex parte *Groome*, *Ibid.* 119.

¹⁰ For the form, see vol. 2.

adjudication is so far final, that the commissioner may, notwithstanding the subsequent death of the bankrupt, proceed in the fiat as if he were still living;¹ but he cannot adjudicate if the party is already dead, the fiat being in that case absolutely abated, and the commissioner deprived of all further authority.²

The court of review has no authority to compel the commissioner to adjudicate; for he is the only tribunal, to which this particular proceeding (which is entirely discretionary on his part) has been committed by the legislature.³ All that the court can do is, to order the commissioner to proceed generally in the execution of the fiat. Neither has the court jurisdiction to control the discretion of a commissioner, as to what documentary evidence he shall require to be produced to prove an act of bankruptcy; though the court will intimate its opinion on the subject.⁴ Where, however, under the former proceedings in bankruptcy, the petitioning creditor, either from the death, the absence, or the differing in opinion of the commissioners, was unable to obtain any adjudication of the bankruptcy, he was permitted, upon application to the lord chancellor, to take out another commission against the bankrupt, upon the same docket papers on which the first commission issued, directed (if in London) to another list of commissioners next in turn at the bankrupt office.⁵ But this was not granted, where the commissioners had exercised a deliberate judgment upon the matter in refusing to declare the party a bankrupt, and the chancellor was not clearly satisfied that the commissioners had erred.⁶ In one case of this kind, which occurred since the 1 & 2 W. 4, c. 56, it was recommended that the matter should be submitted to the decision of a subdivision court.⁷

After the commissioner has adjudged the party a bankrupt, it is now required by the 5 & 6 Vict. c. 122, s. 23, that before the notice of adjudication is published in the *Gazette*, and before the execution of any warrant of seizure, a duplicate of the adjudication shall be served on the bankrupt personally, or at his place of abode or business, and that he shall be allowed five days from such service to show cause against the validity of the adjudication; and if he

¹ Section 26. *Beasley v. Beasley*, 1 Atk. 97. Ex parte *Dowdney*, 15 Ves. 494. *Doe v. Clarke*, 5 B. & A. 458.

² Ex parte *Boule*, 3 V. & B. 20. 1 Ross, 140.

³ Ex parte *Perrin*, Buck. 510.

⁴ Ex parte *Green*, 4 D. & C. 640.

⁵ Ex parte *Stead*, 1 G. & J. 301.

⁶ Ex parte *Nicholls*, 2 G. & J. 266.

⁷ Ex parte *Brown*, 2 M. D. & D.

shall within that time show to the satisfaction of the court, that either the petitioning creditor's debt, trading, or act of bankruptcy is insufficient to support such adjudication; and no other petitioning creditor's debt, trading, or act of bankruptcy shall be proved to the satisfaction of the court, the adjudication is to be annulled. But if no cause shall be shown, the court is to direct the adjudication to be published in the *Gazette*, and appoint two public sittings for the bankrupt to surrender and conform, the last of which must be not less than thirty days, and not exceeding sixty days from such advertisement, and is to be the day limited for such surrender. If the bankrupt, however, surrender to the fiat before the expiration of the five days, and give his consent in writing, the adjudication may in that case be sooner advertised. In every such advertisement the date of the fiat must be stated.¹ If the party intend to dispute the adjudication, he must cause notice of his intention to be served upon the petitioning creditor or his solicitor, and the deputy registrar of the court, two days, at least, before the day of showing cause against the adjudication.²

It seems that the commissioner should allow counsel to attend for the bankrupt, if he requires it, to show cause against the adjudication.³

But the court will not permit a *creditor* to attend by himself, or his counsel, to oppose the adjudication.⁴

The lord chancellor was accustomed in some cases to order the advertisement of the bankruptcy to be suspended, where the party would swear that he was really solvent, and had committed no act of bankruptcy;⁵ though in one case the advertisement was stayed with some hesitation, upon the application of a *creditor*, accompanied even with the consent of the petitioning creditor.⁶ But such an order was only made, where on inspection of the proceedings no bankruptcy was found⁷, or the bankrupt showed probable cause that he would succeed in his objections to the validity of the fiat,⁸ or where, under a *country* commission, it was necessary to give an opportunity of producing the evidence.⁹

¹ General Order, 12 Nov. 1842, Rule 11.

² General Order of 12 Nov. 1842. Rule 13. Post Append. and 3 M. D. & D. App. p. lvii.

³ Ex parte *Taylor*, Mont. & M. 427.

⁴ Ex parte *Cooke*, 4 Dea. 78.

⁵ Ex parte *Foster*, 1 Rose, 51. 17

Ves. 414. Ex parte *Proston*, 1 Rose, 259. Ex parte *Fletcher*, Ibid. 337. In re *Lewis*, 2 Rose, 59; and see 17 Ves. 518.

⁶ Ex parte *Ogilby*, 1 G. & J. 250.

⁷ Ex parte *Wood*, 1 M. D. & D. 92.

⁸ Ex parte *Rhodes*, 3 Dea. 696.

⁹ Ex parte *Foulkes*, 4 Dea. 44.

⁹ Ex parte *Tarleton*, 19 Ves. 464.

The bankrupt, if he chooses, may *surrender* at the meeting to open the fiat, (without waiting for either of the public meetings,) for the purpose of obtaining an earlier protection from the commissioner.¹

When the commissioner has adjudged the party bankrupt, he issues his warrant to the *messenger* for the immediate seizure of all the bankrupt's personal estate and effects.² As the power and authority of this officer have been considerably enlarged by the modern statutes, and as various rights and duties are connected with the office, it has been thought better to consider them in a subsequent chapter.³

¹ *Ex parte Wood*, 18 Ves. 1.
¹ *Rose*, 36.

² Section 27; see vol. 2, for the form.

³ See post, Chap. VIII.

CHAPTER VII.

OF THE COMMISSIONERS.

SECT. 1. *Of their General Jurisdiction.*

2. *Of their Power over the Bankrupt.*
 3. *Of their Power over the Bankrupt's Property.*
 4. *Of their Power over other Persons.*
 5. *Of the Protection and Indemnity of Witnesses, and other Persons attending the Commissioners.*
 6. *Of the Custody of the Depositions and Proceedings.*
 7. *Of Actions, and other Proceedings, against the Commissioners.*
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SECTION I.

Of the General Jurisdiction of the Commissioners.

Qualification.] By the 1 & 2 W. 4, c. 56, s. 1, his Majesty was authorised by commission under the great seal to appoint six persons, being barristers-at-law, of not less than seven years' standing, or of four years' standing, having previously practised as a special pleader for three years, to be commissioners of the court of bankruptcy in London, and from time to time to supply any vacancy in their number.

Oath.] In lieu of the oath directed to be taken by the commissioners under the 6 Geo. 4, c. 16, another form is prescribed to be taken by each of them on his appointment, before the lord chancellor, and he is not again required to take the oath whilst he continues in office.

Jurisdiction.] Every commissioner is declared to have all

the rights and privileges of a judge of a court of record, and all other rights and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of the judges at Westminster. And by sect. 7, each of the six London commissioners is declared to have all the powers, duties, and authorities which were vested in the former commissioners of bankrupt; except that no single commissioner has power to commit any bankrupt or other person, otherwise than to the custody of a messenger or other officer of the court, to be detained by him and brought up before a subdivision court, or the court of review, within three days after such commitment; for which purpose one of such courts is directed to be forthwith assembled, and to which court such examination must be adjourned.

By 5 & 6 W. 4, c. 29, s. 24, every commissioner also, sitting alone, is declared to have all the powers of a court of record. But no commissioner sitting alone can impose any fine,¹ or commit for a contempt of court, but every such contempt is cognisable only by the court of review. This restriction, however, does not interfere with the previous power given to any commissioner by the 1 & 2 W. 4, c. 56, s. 7, to commit any person examined before him to the temporary custody of the messenger.

By 5 & 6 Vict. c. 122, s. 66, the lord chancellor, by any general or other order, may direct the court authorised to act in the prosecution of any fiat to hear, determine, and make order in any matter in bankruptcy within the original jurisdiction of the court of review, subject, however, to an appeal to that court. Any commissioner is to be deemed and taken to be a court authorised to act in the prosecution of the fiat; and all matters and duties directed or authorised by the act to be done by the court of bankruptcy, may be done by any one of the commissioners. And every court authorised to act and acting in the prosecution of any fiat, or in execution of any duty imposed, or to be imposed, on such court by that or any other act thereafter to be in force, is declared to have all the powers and privileges of a court of record. And by sect. 70, the commissioners in London, or the major part of them, and such of the country commissioners as shall be nominated by the lord chancellor for that purpose, may make from time to time, subject to the sanction and confirmation of the lord chancellor, general rules and orders for regulating the practice in every court authorised to act in the prosecution of fiats in bankruptcy.

¹ And see *Ex parte Fulkner*, 2 M. & A. 311. 2 Cr. M. & R. 525. 5 Tyr. 915.

By the 7 & 8 Vict. c. 70, for facilitating arrangements by trust deeds between debtors and creditors, one of the commissioners is empowered to privately examine into the matter of any petition presented under that act, and to direct certain proceedings for carrying the provisions of it into execution.

Auxiliary jurisdiction.] By 5 & 6 Vict. c. 122, sect. 85, the several courts authorised to act in the prosecution of fiats are to be auxiliary to each other for proof of debts, or for the examination of witnesses on oath, and are to possess the same powers to compel the attendance of, and to examine, witnesses, and to enforce both obedience to such examination, and the production of books and other documents, as are possessed by the court to which the fiat is directed. All such examinations must be taken down in writing, and annexed to the proceedings under the fiat; and no such proof or examination can be taken by any auxiliary court, without the permission in writing of the court to which the fiat is directed. This enactment renders it now unnecessary to issue any auxiliary commission or fiat under the 6 Geo. 4, c. 16, s. 20, for the proof of debts under 20*l.*, or for the examination of witnesses.

By sect. 86, the lord chancellor may authorise any commissioner or deputy registrar of the court in London, or other qualified person, to act for or in aid of any country commissioner or deputy registrar, and *vice versa*; or any country commissioner or deputy registrar of one district to act for or in aid of any country commissioner or deputy registrar of any other district. And by sect. 87, the travelling expenses of any such commissioner or deputy registrar, or other person so acting in aid, are to be paid (and in the case of a commissioner, or deputy registrar, in addition to his salary) out of "The Bankruptcy Fund Act," and the amount to be in the discretion of the lord chancellor.

Sittings.] By the general order¹ of 12 January, 1832, the London commissioners are required to sit daily (with the exception of Sundays and holidays) at ten o'clock, at the court in Basinghall-street, and to hold their subdivision courts at the same place.

Subdivision courts.] By 1 & 2 W. 4, c. 56, s. 6, the London commissioners may be formed into two subdivision courts, consisting of three commissioners for each court, for hearing and determining the matters and things, and taking the

¹ Rule XIV. see Vol. 2, Appendix; and see 1 Deac. & C. App. xxv.

examinations after referred to in the act; and all references or adjournments by a single commissioner to a subdivision court are to be to that to which he belongs, unless the commissioner, in case of the sickness of one of the commissioners of the subdivision court, or for other sufficient cause, shall think fit otherwise to direct.

And it is further provided by the 5 & 6 W. 4, c. 29, s. 23, that, in case of the non-attendance of any one of the commissioners of the subdivision court, the reference shall not be of necessity to the other subdivision court; but the remaining commissioner or commissioners of such subdivision court may call in and require the attendance of either or any of the commissioners of the other subdivision court, and may thus form a legal subdivision court. By 1 & 2 W. 4, c. 56, s. 6, subdivision courts may sit either in public or private, unless where it is otherwise provided by the act, or by the rules to be made in pursuance of the directions of the act.

By s. 30, any one of the commissioners may adjourn the examination of any bankrupt, or other person, to be taken either before a subdivision court or the court of review, and may likewise adjourn the examination of a proof of debt to be heard before a subdivision court, which is to determine upon such proof of debt, without any appeal, except upon matter of law or equity, or of the refusal or admission of evidence. But if, before the commissioner or the subdivision court, both parties consent to have the validity of any debt in dispute tried by a jury, an issue is to be prepared under the direction of the commissioner or subdivision court, and sent for trial before the chief judge, or one or more of the other judges of the court of review; and if one party only applies for such issue, the commissioner or subdivision court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the court of review.

By s. 31, if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence, in the case of any disputed debt, such matter may be brought under review of the court of review by the party who thinks himself aggrieved; and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum, not exceeding any expected dividend on the debt in dispute in such proof, may be set apart in the hands of the accountant general, until such decision be made; and in like manner there may be an appeal from the court of review to the lord chancellor.

If (by s. 32) any appeal, either to the court of review or to the lord chancellor, shall be allowed in relation to the

admission or refusal of evidence, the proof of the debt must be again heard by the commissioner or subdivision court, and the evidence then admitted or rejected accordingly.

By 5 & 6 W. 4, c. 29, s. 24, the subdivision courts and the commissioners have power to administer oaths on affidavits to be sworn before them in matters of bankruptcy, in all cases where the same may be administered by a master in chancery. And by s. 25, the subdivision courts are declared to be courts of record, and to have all such powers of commitment as were vested in commissioners of bankrupt at the time of the passing of the 1 & 2 W. 4, c. 56, and to have all the powers and incidents of a court of record, as fully as any of the courts of law at Westminster.

By 5 & 6 Vict. c. 122, s. 69, the subdivision courts, as well as any court authorised to act in the prosecution of a fiat, may award such costs, in all matters before them, as shall seem fit and just.¹

In forming a subdivision court, it is indispensable that *three* commissioners should be present, although it is not necessary that they should be unanimous in their judgment.²

Country commissioners.] By the 5 & 6 Vict. c. 122, s. 59, Her Majesty was empowered to appoint not exceeding twelve persons, being serjeants or barristers-at-law, of not less than seven years' standing at the bar, to be additional commissioners of the court of bankruptcy, to act in the prosecution of fiats in the country, who were required to take the like oath before the lord chancellor as previously administered to the London commissioners. Any one of such additional commissioners may form a district court of bankruptcy at such place and for such district as Her Majesty, with the advice of the privy council, shall direct, with power to describe, and from time to time to alter, the limit and extent of every such district. But nothing is to prevent the lord chancellor, when he shall deem it expedient, from directing any fiat to the court of bankruptcy in London. And by sect. 60, upon the death, resignation, or removal from office of any such additional commissioners, or any of their successors, Her Majesty may in like manner supply such vacancy.

By sect. 62, the additional commissioners hold their offices during their good behaviour, and are subject to the like privileges, disabilities, and penalties as the former commissioners were subject to under the 1 & 2 Will. 4, c. 56.

¹ And see post, Chapter on Costs.

² Ex parte Lampon, 3 D. & C. 751.

By the 7 & 8 Vict. c. 96, s. 42, the lord chancellor may attach the country commissioners to such districts described by Her Majesty in council, as he shall think fit; and, by sect. 44, may authorise them to hold sittings at any other places than those at which they have been used to sit, in which case the commissioners and registrars are to be paid their travelling and other expenses.

By 5 & 6 Vict. c. 122, sect. 90, the several fees authorised to be taken in the country courts are specified in the schedule¹ to the act; they must be paid over to the chief registrar in London, to be by him applied in payment of such salaries to ushers and other under officers of the country courts as the lord chancellor may direct.

The practice of the court of bankruptcy in London is directed to be followed in the district courts, and the proceedings to be in the same form, *mutatis mutandis*, and to be kept in each district court, unless directed by the lord chancellor to be transmitted to the court of bankruptcy in London.²

General powers, duties, and regulations.] All monies paid into the bank of England to the credit of the accountant in bankruptcy are subject to the order of a commissioner, in writing under his hand, and testified by a deputy registrar as to the application thereof. But every such order must specify the amount of any payment to be made, the purpose to which it is to be applied, and the name of the official assignee to whom the same is to be made, and, where the sum to be paid exceeds 500*l.*, the name of the person beneficially entitled. The accountant is required, pursuant to such order, to pay the sum specified therein out of the bankrupt's estate by a draft subscribed to and on the same paper with such order.³ And all such orders of a commissioner for payment of money, or for the transfer and sale of stock or securities, must be signed in triplicate, one copy of which is to be filed with the proceedings, another copy to be left with the Bank of England, and the third to be left with the accountant.

Any one of the commissioners of the court acting in the prosecution of any fiat may, from time to time, make order relative to the delivering out to an official assignee of any bill or note, which may stand in the Bank of England to the credit of the accountant for the estate under

¹ See post, Vol. 2.

² General Rules and Orders of 12 Nov. 1842, Rule 6, see post, Append. & 3 M. D. & D. App. p. lvi.

³ Lord Lyndhurst's General Order, 12 Nov. 1842, Rules 16, 17, post, App. and 3 M. D. & D. App. p. lxix.

such fiat; provided the purpose of such delivery be stated in the order, and the order be attested by a deputy registrar.¹ And any one commissioner may also, as often as it shall appear to him expedient, by order under his hand in the form specified in the schedule to the general order, direct any money in the Bank of England belonging to a bankrupt's estate to be invested in the purchase of exchequer bills to be lodged in the bank, and may in like manner direct the sale or exchange of such exchequer bills, and also the exchange, sale, or transfer of any stock, or public securities which shall have been paid into the Bank of England on account of the bankrupt's estate, and direct the proceeds to be laid out in the purchase of exchequer bills, to be deposited in the bank to the credit of the accountant for such particular estate; and the accountant may, pursuant to such order, make such sale, purchase, or transfer, and the expenses be charged to the account of the estate.² The signature of the commissioner must be attested by a deputy registrar, and the order of the accountant be subscribed to the order of the commissioner and on the same paper. And no stock can be transferred for any sale, nor any public security be delivered for the purpose of sale, except to a cashier of the bank, until the price be paid into the bank to the credit of the accountant in bankruptcy; and no sum is to be paid for the purchase of any public security, until it be deposited in the bank to the credit of the accountant.

The commissioner acting in the execution of any fiat is bound to execute an order of reference from the court of review directing him to inquire into any matters relating to the bankruptcy, and to report the same to the court;³ but it seems, that neither that court, nor the lord chancellor, can compel a commissioner to execute such order, and that the only remedy to enforce the performance of the order would be, either by the proceeding of *mandamus*,⁴ or by information, or *scire facias*.⁵

The commissioners are a tribunal sufficient to have their witnesses protected,⁶ though in this case it is rather a privilege than a protection; for *they* have not power to discharge a witness who is arrested during his attendance on them, but the witness is compelled to apply by *habeas corpus* to one of the superior courts. They have power, however, to

¹ Id. Rule 20.

² Id. Rule 21.

³ Ex parte *Steward*, 3 M. D. & 405. And see Ex parte *Rolfe*, 2 Dea. 421.

⁴ 3 Bl. Com. ch. 7, p. 110.

⁵ 5 Com. Dig. tit. "Officer." (K. 2), (K. 3), (K. 11), (K. 13).

⁶ 2 Black. 1142.

administer an oath; and any person falsely swearing before them may be indicted for perjury.¹

Where the directions of the statute for the conduct of the commissioners are plain and positive, they ought to be strictly pursued; but where any *discretion* is vested in them, *that* is not subject to control. Thus the court of King's Bench will refuse a *mandamus* to a commissioner, to certify the bankrupt's conformity to the lord chancellor; the legislature having vested a discretion in the commissioner in that respect, with which the court will not interfere.² And where the lord chancellor sends back the bankrupt's certificate, for the purpose of letting in other creditors, the commissioner is not confined to that object, nor bound by the original certificate; but the whole is again open to his judicial³ discretion. So, in the examination of a person as to any portion of the bankrupt's property, which may have been received by him,—the commissioners were to determine, at the hazard of an action, whether the questions were such as the person was bound to answer; and the lord chancellor would not interfere, by making an order upon them to enforce answers to any particular questions⁴ to be put to such person, or to restrain them from requiring the production of a particular deed.⁵

By the 6 Geo. 4, c. 16, s. 60, the commissioners are empowered to expunge, or reduce, the proof of a debt under the fiat,—an authority which they did not previously possess.⁶

A commissioner is bound to act throughout the proceedings in every matter, according to the best of his judgment and discretion; and he ought not to decline to act in any matter, merely for the purpose of having a petition presented to obtain the opinion of the court of review on the subject.⁷ But, wherever the legislature has given authority to the commissioners, without giving them power to punish disobedience to that authority, or to make the authority available for its purpose, the great seal has been accustomed to lend the aid of its general jurisdiction, to execute and enforce the provisions of the legislature.⁸

The commissioners are, from the nature of their trust, incapacitated from purchasing any of the bankrupt's property,

¹ 6 Geo. 4, c. 16, s. 99.

² *Ex parte King*, 7 East, 92.

³ *Ex parte King*, 15 Ves. 126.

⁴ *Ex parte Farr*, 9 Ves. 513; and see post, 157.

⁵ *Ex parte Beeston*, Mont. & M. 244. And see *ex parte Groom*, 4 D. & C. 640.

⁶ And see post, c. 9, s. 27.

⁷ 13 Ves. 590. It appears from several old cases in the books, that commissioners were formerly in the practice of asking and receiving the opinion of the court of Common Pleas. 2 Christ. B. L. 9, 10.

⁸ *Ex parte Woolley*, 1 G. & J. 395.

either for themselves or others.¹ And this disability attaches to a commissioner, who has not even acted under the fiat; but if he has obtained the consent of the creditors at a general meeting called for that purpose, it seems, that he may then become a purchaser under an order of the court of review.²

An appeal lies from the determination of a commissioner to the court of review by petition;³ he will not, however, upon any such petition be ordered to pay costs.⁴

The authority of the commissioners is not determined, as we have seen, by the demise of the Crown, nor by the death of the bankrupt after adjudication; in the latter case they are expressly empowered to proceed in the fiat, as if the bankrupt were still living.⁵

Power of imprisonment, &c.] In certain cases the commissioners have power to issue process of imprisonment; but this power is intended not so much to punish the party, as to compel an answer⁶ to questions put by them to the bankrupt and others, for the discovery of the estate and effects; and the process they issue is in the nature of process for contempt. But they have no power given them of committing generally for a contempt. Thus, in the case of any person being guilty of riotous conduct in the presence of the London commissioners, to the obstruction of their proceedings, they were not empowered to commit the person for the contempt, but only to order him to be taken before an alderman, or justice of the peace.⁷ And by the 5 & 6 Will. 4, c. 20, s. 24, they are expressly excluded, when sitting alone, from the power of imposing a fine or committing for contempt, every such contempt being only cognisable by the court of review.

Before the alteration of the bankrupt law by the 1 & 2 Will. 4, c. 56, the commissioners were not considered as a court of justice, as they were not in any statute denominated judges.⁸ But by the provisions of that and subsequent acts, as we have already seen, it is expressly declared that each commissioner, though sitting alone, shall have all the powers of a court of record, which would of course include the

¹ Ex parte Bennett, 10 Ves. 381.

² Ex parte Harrison, Buck. 17.

³ Bromley v. Goodere, 1 Atk. 77.

⁴ 1 & 2 Will. 4, c. 56, ss. 17, 30.

⁵ Ex parte Scarth, 14 Ves. 104.
15 Ves. 293.

⁶ 6 Geo. 4, c. 16, s. 26.

⁶ And see Miller v. Seare, 2 Bl. 1141. Perkins v. Proctor, 2 Wils. 384.

⁷ 1 & 2 G. 4, c. 113.

⁸ Kinder v. Williams, 4 T. R. 318.

1 Ld. Raym. 467. 2 Bl. 1145.

8 Co. 121.

power of fining or imprisoning for contempt, if that power was not expressly excepted by the 5 & 6 Will. 4, c. 29, s. 24. And the only question is, whether the subsequent act of the 5 & 6 Vict. c. 122, s. 66, which declares that every court, authorised to act in the prosecution of any *fiat*, shall have all the powers of a court of record, and that any one commissioner shall be deemed and taken to be such court, virtually repeals the express exception in the previous act of the 1 & 2 Will. 4, c. 29.¹

SECTION II.

Of the Power of the Commissioners over the Bankrupt.

As to the *Examination* of the Bankrupt previous to *Commitment*, see post, Ch. XIII.

As soon as the party is declared a bankrupt, the commissioner is empowered to call upon him to surrender himself within the time limited by the statute. But if he has reason to apprehend that he is embezzling his effects, or preparing to depart the kingdom, he may summon him to appear before them to be examined² immediately. And in case the bankrupt without any lawful impediment disobeys the summons, (which the commissioner may now issue at any time, and for any purpose, whether he has obtained his certificate or not,) the commissioner may, by warrant under his hand and seal, authorise any person to arrest him and bring him before them.³ But the issuing of the warrant entirely rests with the discretion of the commissioner, and the court of review will not interfere, by directing him to issue a warrant for the apprehension of a bankrupt who has absconded.⁴ Upon the appearance of the bankrupt before a commissioner, he may examine him upon oath, either by word of mouth, or on

¹ See, as to this point, an able judgment of Mr. Commissioner Goulburn in a note to *Ex parte Collins*, 3 M. D. & D. 607.

² *Ex parte Lingood*, 1 Atk. 240.

³ 6 Geo. 4, c. 16, s. 36. Formerly, if the bankrupt disobeyed the summons of the commissioners, they could not issue their own warrant against him, but were obliged (under the 5 Geo. 2, c. 30, s. 14,) to certify his disobedience to a

judge, or justice of the peace, in order to obtain from them a warrant for his apprehension. (And see *Ex parte Hunt*, 2 J. & W. 560.) And when the bankrupt had passed his last examination, it seems to have been the practice to apply to the lord chancellor for an order on the bankrupt to attend the commissioners. *Ex parte Bradley*, 1 Rose, 202. *Anon.* 14 Ves. 450.

⁴ *Re Creed*, 3 Dea. 38.

interrogatories in writing,¹ touching all matters relating to his trade, dealings, or estate; or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, or effects. The commissioner has, in this examination, a duty imposed upon him as well as an authority, to get out an account and discovery for the benefit of the creditors.² The bankrupt's answers should be taken down in writing, and he is required to sign them. If the bankrupt refuses to be sworn, or to answer any questions put to him by the commissioner, or does not fully answer to his satisfaction, or refuses to sign his examination,—the commissioner may then by his warrant commit him to prison, without bail, until he shall submit himself to be sworn, and make full answer³ to his satisfaction to such questions as shall be put to him, and sign his examination. The commissioner must, however, in every such commitment for refusing to answer, or not fully answering, any question, specify the question and answer in the warrant of commitment.⁴

As the commissioner has but a special authority, in the commitment of the bankrupt and other persons to prison,⁵ he should be careful not to exceed it. Before the late alteration in the bankrupt law, the commissioners were frequently harassed with actions, when a commitment by them proved to be invalid; though the legislature in a great measure protected them, in case of an innocent mistake, by enabling them to tender amends,⁶ and to pay money into court, as well as by giving them double costs,⁷ in case of a verdict being found for them. As a commissioner, however, is not invested with an unlimited authority of committing whom and for what he may please, any warrant of commitment which he feels himself called upon to issue, should pursue the words of the act of parliament, and appear on the face of it to be within the scope of his authority; for the superior courts have been very-strict in their construction of the powers thus vested in commissioners by the legislature.⁸ They have not power to commit the bankrupt, or any other person, for not answering a question, the answer to which

¹ 6 Geo. 4, c. 16, s. 36.

² *Taylor's case*, 8 Ves. 321.

³ The answer must be full in this sense,—that it must be reasonably satisfactory to the mind that is to decide; per Lord Eldon, *Taylor's case*, 8 Ves. 331.

⁴ 6 Geo. 4, c. 16, s. 39, and see post, Ch. XIII. "Of the Commitment of the Bankrupt."

⁵ *Bracy's case*, 1 Salk. 348.

⁶ 6 Geo. 4, c. 16, s. 43.

⁷ Sect. 44.

⁸ *Bracey's case*, Comb. 391. *Res. v. Nathan*, 2 Str. 880. *Hollingshead's case*, 2 Ld. Raym. 851, 1 Salk. 351. *Bracy v. Harris*, 5 Mod. 309; and see post, "Of the Commitment of the Bankrupt."

would *directly* criminate himself;¹ but otherwise, if it would only *tend* to show that he had done something criminal.² If the bankrupt, however, refuse to *account for any part of his effects*, on the ground that his answer to the inquiry of the commissioner would criminate himself, such refusal subjects him to a commitment.³

If the commissioner thinks that the bankrupt has *not answered satisfactorily* upon his examination, he is bound to commit him; for he is not obliged to give credit to any absurd or improbable account, merely because the bankrupt has the effrontery to swear to it.⁴ Indeed, there are no technical rules by which cases of this kind can be determined; but the question in each particular case is, whether the answers given by the bankrupt be sufficient to satisfy the mind of any reasonable person.⁵ The bankrupt, however, after such commitment, may be discharged, upon his answering satisfactorily to the commissioner at a subsequent time, —or, upon his answer already given being deemed satisfactory by the superior jurisdiction, before which he may be brought by writ of *habeas corpus*.⁶ But, though the bankrupt should be afterwards discharged by *habeas corpus*, on the ground of the court thinking his answers satisfactory, an action of trespass will not lie against the commissioner;⁷ for in the exercise of his discretion under the sanction of an oath, he is *required* to commit, if the answers of the bankrupt be not to his satisfaction.

A commissioner cannot delegate his authority to any other person to examine the bankrupt, without his consent; such person being incompetent to exact any submission from him, upon which the commissioner can commit.⁸

It seems somewhat doubtful, whether a commissioner should be influenced by extrinsic evidence in committing the bankrupt for not answering satisfactorily; but if he be so influenced, the evidence should be fully read over to the bankrupt, before he can call upon him for an answer to the questions proposed to him in his examination.⁹

¹ 6 Mod. 309. Comb. 391.

² Ex parte *Comens*, Buck. 531.

³ Ex parte *Oliver*, 1 Rose, 407.

⁴ 6 T. R. 120. *Doswell v. Impey*,
1 B. & C. 163.

⁵ Ex parte *Nowlan*, 6 T. R. 118.

⁶ 11 Ves. 511. *Taylor's case*, 8 Ves.
328.

⁶ 1 Rose, 407.

⁷ *Doswell v. Impey*, 1 B. & C.
163; and see title "Actions."

⁸ Ex parte *Cassidy*, 2 Rose, 219.
19 Ves. 324.

⁹ *Crowley's case*, Buck. 264. 2
Swanst. 1.

SECTION III.

Of the Power of the Commissioners to seize the Bankrupt's Property.

And see further upon this head, "*Messenger*," and "*Assignees*."

The commissioners have, by the 6 Geo. 4, c. 16, s. 12, full power and authority to take such order and direction, as is afterwards particularly specified in the act, with all the bankrupt's lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold, as freehold, which he had in his own right before he became bankrupt, as also with all such interest therein as he may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever the same may be found or known, and to make sale thereof as directed by the act, or otherwise order the same, for satisfaction and payment of the creditors of the bankrupt.

This clause is the foundation of the powers, which the commissioners possess over the bankrupt's property.

Warrant of seizure.] As soon as the party is declared a bankrupt, the commissioner is then empowered to issue his warrant,¹ under his hand and seal, for the seizure of all the bankrupt's effects, books, papers, or writings, wherever they may be, either in England, Scotland, or Ireland; and his officer, in order to make such seizure, may break open² any house or place where the bankrupt, or any of his property, shall be reputed to be. And by 5 & 6 Vict. c. 122, s. 30, where it shall be made to appear to the court authorised to act in the prevention of the fiat, that there is reason to suspect or believe that property of the bankrupt is concealed in any place not belonging to him, the court is authorised to grant a search warrant to any person, who is entitled to the same protection as is allowed by law in execution of a search warrant for stolen property. And when any of the property is in Ireland or Scotland,³ the warrant must be first verified in the manner directed by the statute, and indorsed, before it

¹ 6 Geo. 4, c. 16, s. 27.

² The commissioners could not formerly justify the breaking open

any house, except the bankrupt's. (2 Show. 247.)

³ 6 Geo. 4, c. 16, s. 28; and see post, title "*Messenger*."

is executed, by a judge ordinary, or justice of the peace in the county where it is intended to be executed. The *property*, and the *person*, should not both be taken under one warrant, but there ought to be two separate warrants for this purpose.

SECTION IV.

Of the Power of the Commissioners over other Persons than the Bankrupt.

The authority of the commissioners is now more complete and extensive than what they formerly possessed, in regard to requiring the attendance of witnesses and other persons, to give evidence upon oath before them of any matter relating to the bankruptcy.¹ They may not only *summon* witnesses to depose as to the trading and the act of bankruptcy, and call for the production of any books and documents necessary to establish the one or the other,—but they may also, in case of disobedience to the summons, issue a *warrant* to compel² their attendance. And the witness will incur the same penalty for refusing to be sworn and examined, for not fully answering, for refusing to sign his examination, or for not producing books or documents, as is provided with respect to persons summoned after adjudication.³

Every warrant must be under the hand and seal of one of the commissioners; and every summons under his hand.⁴ And where the party summoned keeps out of the way, and cannot be personally served, then, upon affidavit of the fact, and that due pains have been taken to effect such personal service, the commissioner may, by indorsement on the summons, order that a delivery of a copy of it to the wife or servant, or some adult inmate of the house or family of the party, at his usual or last known place of abode or business, signifying the purport thereof, shall be equivalent to personal service.⁵

Although a party summoned as a witness alleges that he

¹ Section 24.

² This power was first given to the commissioners by the temporary act of the 4 & 5 Ann. c. 17; but it was not again conferred upon them before the 3 Geo. 4, c. 81; previous to which last-mentioned act, the commissioners had no power to *compel* the attendance of witnesses to prove the act of bank-

ruptcy and the trading, without obtaining an order of the lord chancellor for that purpose. (Ex parte *Lund*, 6 Ves. 781. Ex parte *Higgins*, 11 Ves. 8. Ex parte *Jones*, 1 Rose, 39. &c.)

³ 6 Geo. 4, c. 16, s. 33.

⁴ 5 & 6 Vict., c. 122, s. 79.

⁵ Section 80.

is a creditor, and therefore not competent as a witness to prove the trading or act of bankruptcy, it is no preliminary objection to his being examined by the commissioner; for the result of the examination may establish that he is not a creditor.¹ Trustees, also, in a deed of assignment of all the bankrupt's effects are compellable to produce it before the commissioner, for the purpose of proving thereby an act of bankruptcy;² though the petitioning creditor, as we have seen, if he has acted under such a deed, cannot avail himself of it for such purpose. A witness is not justified in refusing to attend the commissioner to prove the act of bankruptcy, under a *joint* commission against two partners, because he has already attended for the same purpose, under *separate* commissions previously issued against them. And where, in such a case, the petitioning creditor under the *separate* commissions refused to disclose the person who proved the act of bankruptcy under those commissions, the lord chancellor inspected the proceedings under the separate commissions, and ordered that person to attend the commissioners under the *joint* commission at the peril of costs.³

But a commissioner, acting in the execution of a joint fiat, cannot compel the petitioning creditor to a prior *separate* fiat to attend him, in order to give evidence in support of the subsequent *joint* fiat against the same party and his co-partner; for this would be compelling him to be a witness to destroy his own proceedings.⁴

The commissioner is also empowered, after the party has been adjudged⁵ a bankrupt, to summon before him any person suspected of having any of the bankrupt's property in his possession; and his power in this respect is not confined to persons claiming a beneficial interest in such property; for the mere detention of the property, whatever may be the motive, is sufficient to give the commissioner jurisdiction.⁶ He may also summon any one who is supposed to be indebted to the bankrupt,—as well as any person whom he believes capable of giving information⁷ concerning any part of the

¹ In re *Gooldis*, 2 Rose, 330.

² Ex parte *Cawkwell*, 1 Rose, 313. Ex parte *Treacher*, Buck. 17.

³ Ex parte *Gardner*, 1 Ves. & B. 74, and see post, 162.

⁴ Ex parte *Stones*, 1 G. & J. 30.

⁵ 6 Geo. 4, c. 16, s. 33.

⁶ Ex parte *Anderson*, Buck. 397.

⁷ The commissioners could not before enforce the attendance of any

persons, except those suspected of having the bankrupt's property, or of being indebted to his estate (Ex parte *Levett*, 1 G. & J. 185; and see ex parte *Woolley*, *ibid.* 395); and their jurisdiction in this respect was only supported, by applying to the lord chancellor for an attachment against those who made default. 14 Ves. 449.

bankrupt's estate, or any fictitious debt, or any spurious book or document, or other transactions material to the full disclosure of the dealings of the bankrupt; and he may require the production of any books or documents, which may appear to him necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which he is authorised to inquire into. A mortgagee may therefore be compelled by a commissioner to produce his mortgage deed, and may be committed by him for refusing to produce it.¹ But all documents required to be produced should be described in the body of the summons, previously to the summons being signed by the² commissioner, and the party summoned is bound not only to attend at the appointed hour, but to wait till he can be examined, under the penalty of commitment.³ And if any person so summoned neglects to attend, having no lawful impediment, the commissioner may, by warrant under his hand and seal, direct him to be apprehended and brought before him to be examined; which warrant, if the commissioner is aware of the service of the summons, he may issue, without evidence upon oath of the service of it.⁴ But there must be a reasonable time between the service of the summons and the time when the witness is required to attend.⁵ The warrant may be granted, after issuing one summons, though it was formerly thought necessary to issue two summonses.⁶

Where an order was made by a district commissioner on a solicitor to pay a certain sum to the official assignee, without stating the special facts on which the order was made, or that the party was a solicitor of the court, or that he acquiesced in the order, it was held that the commissioner had no jurisdiction to make such an order.⁷

Power to examine persons.] The commissioner has also power to examine⁸ any person upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of the bankrupt,⁹ or concerning any act or acts of bankruptcy by such bankrupt

¹ Ex parte Caldecott, Mont. 55.

² Ex parte Frowd, Mont. & M. 269.

³ Wright v. Maude, 10 Mees. & W. 527. 2 Dow. P. C. N. S. 517.

⁴ Grocock v. Cooper, cor. Lord Tenterden, Guildhall, July 25, 1827.

⁵ Id. 8 B. & C. 211.

⁶ Dyer v. Missing, Bl. 1035.

⁷ Ex parte Collins, 3 M. D. & D. 604.

⁸ 6 Geo. 4, c. 16, s. 34.

⁹ The bankrupt, whose estate is sought to be charged by an examination before the commissioners, has a right to be present during the examination; ex parte Eardley, 1 Mont. Dig. 115.

committed, and to reduce into writing the answers of such person and compel him to sign them. And if any person, upon such examination, or in any affidavit or deposition or solemn affirmation, wilfully and corruptly give false evidence, or swear or affirm any thing which shall be false, he is liable to the penalties of perjury.¹ A commissioner, however, has no power to examine the executors of a debtor to the bankrupt, as to the amount of assets that have come to the hands of such executor; for this does not concern "the person, trade, or dealings, of the bankrupt, but the estate of the testator."² But where a testator directed his business to be carried on by his executors, and that when his son B. (the bankrupt) attained twenty-one, he should, on performing certain conditions, be admitted to one fourth share; and B., at the age of twenty, entered into another business, and never claimed the right under the will; it was held, nevertheless, that he had not abandoned the right, and therefore that the commissioner might examine the executors, as to the affairs of the partnership.³ If any person refuse to be sworn, or to answer any lawful questions put to him by the commissioner, touching any of the matters above mentioned, or shall not fully answer to his satisfaction, or shall refuse to sign his examination, not having any objection allowed by the commissioner, or shall not produce any books or documents in his custody or power, which he was required to produce, and to the production of which he shall state no objection allowed by the commissioner,—in any of these cases, the commissioner may, by warrant under his hand and seal, commit him to prison without bail, until he shall submit himself to him to do what was previously required of him. The commissioner may therefore call the bankrupt's former partners before him, although the partnership has been some time dissolved, and examine him and the books relative to the former dealings of the bankrupt.⁴ The warrant of commitment should, as in the case of committing the bankrupt, pursue the words of the act of parliament;⁵ and specify correctly the cause of commitment. Therefore where a witness, who was summoned to produce a deed of the bankrupt's property, refused to produce it, and was committed for *not answering satisfactorily*, it was held that the

¹ 5 & 6 Vict., c. 122, s. 81.

² *Ex parte Solarte*, 1 Deac. & C. 311. Mont. 495.

³ *Ex parte Marks*, 1 D. & C. 499.

⁴ *Ex parte Trueman*, 1 D. & C. 464.

⁵ *Res v. Nathan*, 2 Str. 880. Salk. 351. 2 Ld. Raym. 851; and see ante, 160.

warrant was defective, and that the commitment ought to have been for *not producing the deed*.¹ So, where a witness produces a book, but refuses to read an entry in it, he cannot be committed for not producing the book, nor for refusing to answer a question.² But where a witness would have been able to answer the questions more satisfactorily, if he had referred to his books, and refused to produce such books to refresh his memory, and was therefore unable to answer the questions, it was held, in this case, that he might be committed for not answering satisfactorily; for that this was tantamount to a refusal to answer.³

It is no objection to the warrant of commitment of a witness, that it does not state precisely which were the unsatisfactory answers; nor that some of the questions put relate, not to sales by the bankrupt to the witness, but to other persons.⁴

The warrant should specify all the questions and answers, as far as they are applicable to the commitment.⁵ And in case an *habeas corpus* is brought by the person committed, and there shall appear merely an insufficiency in the *form* of the warrant, the court, or judge, may re-commit the party until he shall conform; unless it be shown that he has fully answered, or that he had a sufficient reason for refusing to do what was required of him. And the court, or judge, may look at the whole of the examination, in order to consider whether the answers of the party were satisfactory or not.

As the commissioners are authorised to examine a witness concerning the trading, or the act of bankruptcy, or the estate and effects of the bankrupt, they may, incidentally to this power, examine him also respecting other individuals, through whom they may be likely to obtain information on those points. Therefore, where a witness was asked questions, as to when and where he last saw the bankrupt's wife, it was held, that such questions were both legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to those questions.⁶ The true criterion of judging as to the propriety of the commitment is, to consider all the questions and answers collectively—and then to say, whether the *whole* examination is

¹ Ex parte *Froud*, Mont. & M. 269.

² Ex parte *Isaac*, Mont. & M. 23.
Isaac v. Imprey, 10 B. & C. 442.

³ Re *Dale*, Mont. & M. 271.
Note (a).

⁴ Ex parte *Burdwell*, 1 Coop. Sel. Ca. 449.

⁵ And see post, c. 13, s. 2, 3, 4.

⁶ Ex parte *Vogel*, 2 B. & A. 219.

satisfactory, or not. Therefore, though *some* of the answers, when taken alone, may be considered satisfactory,—yet this is no objection to a warrant committing the party till he should make full answers to *all* the questions put to him.¹

The lord chancellor would not, in general, intrude upon the discretion of the commissioners in the examination of witnesses; although, upon extraordinary occasions, he might limit their examination to a particular mode, or to particular points. Thus, the examination of the mother of the bankrupt was, on petition, ordered to be limited to her son's trading; but Lord Hardwicke refused to restrain the commissioners from asking any question that might be relevant thereto.² And when a banker, who had been summoned before the commissioners, instead of attending them, petitioned the lord chancellor that the commissioners might be restrained from asking him certain questions, the petition was dismissed on the opening of the petitioner's counsel,—Lord Hardwicke saying, that he would not limit or restrain commissioners in their examination, for if he did, it would be attended with expense and inconvenience from other applications of this kind; and that he would not presume, that they would ask trifling and immaterial questions.³

It was formerly holden, that a person suspected of detaining the bankrupt's effects, and who, before the commission issued, had obtained some goods from the bankrupt in discharge of his own debt, was not bound to answer, whether any of the bankrupt's effects had come to his hands *before* the issuing of the commission; and that it was sufficient for him to swear generally, that *he had none of the estate of the bankrupt in his hands*.⁴ But it has been since ruled, that a witness is bound to give an account of what he knew of the bankrupt's effects, as well before, as after, the bankruptcy; and Lord Erskine said, that commissioners, of their own authority, might examine parties, and make them confess the infirmity of their title.⁵ Notwithstanding, however, a person suspected of having the bankrupt's property in his possession is bound to answer questions, though the answer may expose his own defective title, he is not (any more than the bankrupt) compelled to do so, if the answer would *directly criminate* himself;⁶ though he is not excused, if the answer would only *tend* to show, that he had done some-

¹ Ex parte *Vogel*, 2 B. & A. 219.

² Ex parte *Parsons*, 1 Atk. 204.

³ Ex parte *Bland*, 1 Atk. 205.

⁴ *Jeakins's case*, 3 Keb. 837.

⁵ Ex parte *Herbert*, 13 Ves. 189.

⁶ 5 Mod 309. Comb. 391.

thing criminal.¹ But if a witness do unguardedly answer questions to which he might have demurred, his answers may be adduced in evidence against him, for all purposes to which they are legally applicable.² And the commissioner will not be restrained from examining parties, upon a mere allegation that the object of the examination is to procure evidence against them, as to penalties incurred by gaming.³

The commissioner is also empowered to summon before him the *wife*⁴ of the bankrupt, and examine her, for the purpose of discovering such part of the bankrupt's estate and effects as may be concealed, kept, or disposed of, either by herself, or by any other person; and she will incur the same penalty for refusing to be sworn and examined, or for other disobedience to the authority of the commissioner, as other persons are liable to in this respect. But, though the wife may be examined by the commissioner, as to the bankrupt's *property*, he has no power to examine her on any matter relating to the act of bankruptcy; for, by the common law, a wife cannot be a witness either for or against her husband; and this special authority given to the commissioner, which breaks in upon that rule of law, is not to be extended beyond what the statute gives him.⁵ It has been also considered questionable, whether the bankrupt's wife is admissible to prove payments in contemplation of bankruptcy.⁶

The commissioner may likewise examine upon oath, either by word of mouth, or by interrogatories in writing, every person claiming to prove a debt⁷ under the fiat, and may require such further proof, and examine such other persons in relation thereto, as he shall think fit. And it seems that the power of the commissioner in the examination of a *creditor* of the bankrupt, in respect of a debt which he seeks to prove, is not different from that which he may exercise in the examination of other persons concerning the bankrupt's property; and that he may compel him to produce books relating to his transactions with the bankrupt, in the same way as he can enforce the production of the books from other persons,—or if he choose, by the more indirect method of refusing otherwise to receive the proof of his debt.⁸

¹ Ex parte Cossens, Buck. 531.

² Smith v. Beadnell, 1 Camp. 30. 611.

³ Ex parte Burlington, 1 G. & J. 30.

⁴ 6 Geo. 4, c. 16, s. 37.

⁵ Ex parte James, 1 P. Wm.

⁶ 1 Esp. 67.

⁷ 6 Geo. 4, c. 16, s. 45.

⁸ Ex parte Woolley, 1 G. & J.

The commissioner may also at all times summon the *assignees*¹ before him, and require them to produce all books, &c. relating to the bankruptcy,—and, in default of their attendance, may issue his warrant to enforce it; and he has the like power of commitment with respect to them, as with respect to other persons.

As the commissioner cannot issue a *subpoena*, he must, upon any collateral questions, or other matters coming before him, for inquiring into which he is not empowered to issue a summons, proceed by affidavit.²

SECTION V.

Of the Protection and Indemnity of Witnesses, and other Persons, attending the Commissioner.

Witnesses summoned to attend a commissioner of bankrupt have the same privilege as those attending courts of justice, namely, the exemption from arrest *eundo, morando, et redeundo*.³ And it is not material whether the witness be summoned in writing, or verbally, by the messenger,⁴ provided the commissioner afterwards adopt the verbal summons. The privilege also extends to persons who attend voluntarily, on a mere application to them for that purpose,⁵ or who, on their own importunity, are summoned by the commissioner,⁶ as well as to one who attends, even without any application, and requests to be examined as a witness, provided the commissioner signify his intention to do so; but it is a question whether, in this last case, such person would be entitled to protection *eundo*.⁷

A *creditor*, also, who attends to prove his debt, has the same privilege as a witness who is summoned before the commissioner; for he is as much entitled to protection as any party attending the prosecution of his suit in a court of justice.⁸

If the arrest of the witness, or the party attending, amounts to a *contempt*, the application for his discharge is made to

¹ 6 Geo. 4, c. 16, s. 101.

² Ex parte *Thistlewood*, 19 Ves.

250.

³ Ex parte *Ston*, 2 Bl. 1142. Ex parte *Clark*, 2 D & C. 99.

⁴ *Arding v. Flower*, 8 T. R. 534.

⁵ *Ibid.* Ex parte *King*, 7 Ves.

312.

⁶ Ex parte *Kerney*, 1 Atk. 54.

⁷ Ex parte *Byne*, 1 Rose, 451. 1 V. & B. 316.

⁸ Ex parte *List*, 2 Rose, 24. Ex parte *King*, 7 Ves. 316. Ex parte *Bryant*, 1 Mad. 49.

the court of review upon *motion*; ¹ the order upon which is entitled in the bankruptcy; ² and the court administers the oath by the registrar, and examines the party himself. ³ The party arrested may also proceed by process against the officer and solicitor for the contempt. ⁴ If the arrest does not amount to a contempt, then the proper course is to apply by petition; and the court of review, upon an affidavit of the facts, will order him to be discharged. And in case of a detainer being lodged after the arrest, that will also be set aside, if the original arrest is bad. But in both cases, the arresting and the detaining parties will have an opportunity of being heard against the petition, or the motion for the discharge. ⁵ With respect to the *costs* of an application to be discharged from such an arrest, they will be ordered to be paid by the officer or person causing the arrest, but will at the same time in general depend upon whether a contempt was intended or not by the party arresting; they have been ordered, where the witness was arrested by the bankrupt. ⁶ Where the crown is the arresting creditor, the order for discharge must be upon the gaoler. ⁷ If the application for the discharge only affects the creditor arresting, the party may be forthwith discharged; but where there are other detainers, the court must hear the persons by whom they are lodged, for the purpose of ascertaining whether they are founded upon the original arrest. ⁸

Every witness summoned to attend before a commissioner must have his necessary expenses ⁹ tendered to him, in like manner as is required upon service of a subpoena to a witness in an action at law. And it is enough, if the sum tendered is sufficient for the expenses to the place where the commissioner is sitting. If more is necessary to convey him back, the commissioner may award the proper sum. ¹⁰ It is not necessary, however, upon summoning a person suspected to have any of the bankrupt's property (as it is in

¹ Anon. 1 Rose, 230. The court of King's Bench have refused to grant such an application, on the ground, that that court was not the court of which the contempt was committed. *Kinder v. Williams*, 1 T.R. 377.

² 11 Ves. 556. 16 Ves. 413.

³ 16 Ves. 413. *Aylott's case*, *ok. ibid.* *Gauzeigne's case*, 24 Ves. 188.

⁴ *Ex parte Morrey*, 1 Atk. 54. *Ex parte King*, 7 Ves. 315.

⁵ *Ex parte King*, 7 Ves. 315. *Ex parte Donlevy*, *Ibid.* 318. *Ex parte Byne*, 1 V. & B. 316. *Ex parte Ross*, 1 Rose, 360. *Ogle's case*, 14 Wes. 256. *Cuttle's case*, 16 Ves. 423.

⁶ *Ex parte Byne*, *supra*.

⁷ *Ex parte Russell*, 1 Rose, 278.

⁸ *Ex parte King*, 7 Ves. 312.

⁹ 6 Geo. 4, c. 16, s. 85.

¹⁰ *Grocock v. Cooper*, cor. Ld. Tenterden, Guildhall, July 25, 1827.

summoning a witness) to tender him the expenses of his journey before hand, even though the commissioner may have made an order in the first instance for the payment of his expenses, and the assignees have in fact offered to pay such expenses as the commissioner shall think reasonable;¹ but he may afterwards, when his examination is concluded, be allowed such charges as the commissioner shall think fit.² If he is indeed without the means of taking the journey, that may be an excuse for not obeying the summons, but will not invalidate the warrant of the commissioner to bring him before them; and where a party summoned brought an action against the commissioners, it was held that the *onus* lay on him to prove that he was prevented by a lawful impediment from attending them.³ The excuse, however, of being prevented by "private arrangements" is sufficient.⁴ After a party has been examined, he may maintain assumpsit for any costs directed by the commissioner to be paid to him, although such order is merely by parol.⁵

A person who is summoned before the commissioner to be examined by him, is not entitled to the assistance of counsel as a matter of right, but merely as a matter of indulgence; and Lord Hardwicke, upon one occasion, refused to make an order upon commissioners to permit a person so summoned to have counsel, though he recommended them, in that particular instance, to permit it.⁶ This indulgence, however, has in the present day become quite a matter of common practice, and there is no instance of its being refused.

If a witness is prevented by any lawful impediment from attending the commissioner according to his summons, he ought, for his own protection, to make it known to him, and obtain his allowance for the excuse; otherwise a warrant will issue against him as a matter of course.

SECTION VI.

Of the Custody of the Depositions, and other Proceedings before the Commissioner.

By the general order⁷ of the 12th January 1832, all proceedings before the London commissioners must be written

¹ Ex parte *Roscoe*, 2 Rose, 345.

² 6 G. 4, c. 16, s. 35; and see Ex parte *Benson*, 2 Rose, 75. Ex parte *Roscoe*, supra.

³ Ibid.; and see *Battys v. Gresley*, 18 East, 319.

⁴ *Grocock v. Cooper*, supra.

⁵ *Yarker v. Botham*, 1 Esp. 64.

⁶ Ex parte *Parsons*, 1 Atk. 204.

⁷ Rule ix. See vol. 2, Appendix; and see 1 Deac. & C. Appendix xxv.

on parchment or paper of one uniform size, and remain of record in the court of bankruptcy; and, instead of attaching a copy of the *Gazette* to the proceedings in each bankruptcy, as formerly, the deputy registrar is now required to make a memorandum¹ of the appearance of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file, to facilitate search. By the general order² also of the 12th November 1842, after the advertisement of the adjudication, and after every public sitting under any fiat opened in any *district* court, minutes of the fiat and of the proceedings must be transmitted to the court of bankruptcy in London, to be there filed of record. For this purpose, the deputy registrar of the district court is required to make the proper minute of the fiat and proceedings in the form² given by the general order, and to send the same by the general post to the chief registrar in Basinghall Street. But the proceedings in every district court are to be kept in such court, unless directed by the lord chancellor to be transmitted to the court of bankruptcy in London.³ And every solicitor, having in his custody or power the proceedings under any fiat opened after the passing of the 1 & 2 Will. 4, c. 50, is required to bring such fiat and proceedings into the court of bankruptcy in London, or the district court of bankruptcy into which such fiat shall have been transferred, to be registered in such court, and further prosecuted therein; and the deputy registrar attending the commissioner is to take minutes, and have charge of all proceedings before him.⁴

It is in the discretion of the court of review to permit, or refuse, any party to have a copy of his examination before a commissioner.⁵ But where a bill was brought by assignees for a discovery of the bankrupt's effects, the lord chancellor would not allow the defendants to look into their own depositions before the commissioners, in order to make their answers consistent; ⁶ Lord Hardwicke observing, that, as truth is always uppermost, they might put in an answer consistent with what they had already sworn in their depositions, supposing them to be true; and, if false, they swore at their own peril.

Depositions, upon which a commissioner has founded a report to the court of review upon a reference to him, are

¹ Rule xvi.

² See vol. 2, App.; and 3 M. D. & D. App.

³ General order of 12th Nov. 1842. Rule 6, *Ibid.*

⁴ *Ibid.* Rules 7 and 8.

⁵ *Ex parte Chater*, Buck. 290.

⁶ *Boden v. Dellow*, 1 Atk. 288.

proceedings under the bankruptcy, and as such, are to be left in the custody of the proper officer; but the report must be filed in the bankrupt office.¹ And any books or documents, referred to by the bankrupt on his last examination, form likewise part of the proceedings under the fiat.² But neither the solicitor to the fiat, nor any officer of the court, has a lien on the proceedings for their costs or fees in any matter relating to them;³ and costs will always be given against that person, who, by refusing to deliver them up to the proper custody, compels an application to the court of review to obtain them.⁴

SECTION VII.

Of Actions, and other Proceedings, against the Commissioners.

The 6 Geo. 4, c. 16, introduced several fresh regulations with respect to actions against commissioners, affording them, very properly, the same protection as that possessed by justices of peace. Thus, by *Section 40*, in the event of any action being brought against the commissioners by the bankrupt, or other person, for being committed by them for refusing to be examined, or not fully answering to questions, the court or judge upon the trial (if required by the defendant) may, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of such examination; and if it shall then appear to the court or judge that the party was lawfully committed, the defendant will have the same benefit therefrom, as if the whole of the examination had been stated.

By *Section 41*, also, no action can be commenced against any commissioner for any thing done by him as such, unless notice in writing of the intended writ or process shall have been delivered or left at his usual place of abode, by the attorney for the party intending to sue out the same, at least one calendar month previously; the notice, too, must set forth the cause of action, and must be endorsed with the name and place of abode of the attorney, who is to receive no more than 20s. for preparing and serving it. In default

¹ *Ex parte Newton*, 2 Rose, 19. *Ibid.* 134. *Ex parte Sandison*, *Ibid.*

² *Ex parte Hardy*, 1 Rose, 396. 275.

³ *Ibid.* 395. *Ex parte Bullen*, ⁴ *Ex parte Hardy*, 1 Rose, 396.

of proof of such a notice, the commissioner will be entitled to a verdict, and costs against the party bringing the action; and no evidence can be given by the plaintiff, on the trial, of any other cause of action than what is contained in the notice.¹

Every commissioner may also, within one calendar month after such notice, tender² amends to the party complaining, or to his agent or attorney; and, if not accepted, may plead the same in bar to any such action, together with the plea of not guilty, and any other plea, with leave of the court; and, if the jury shall find the amends so tendered to have been sufficient, they are to give a verdict for the defendant. If the plaintiff shall become nonsuit, or discontinue his action, or if judgment shall be given for the defendant upon demurrer, the commissioner will be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only. But, if the jury shall find that no amends, or not sufficient, were tendered, and also against the defendant on the other plea or pleas, the plaintiff will then be entitled to a verdict for damages and costs. And though the commissioner neglects to tender the amends, or tenders insufficient, previous to the action, he may, nevertheless, by leave of the court, at any time before issue joined, pay into court such sum as he shall think fit; upon which such proceedings shall be had, as in other actions where the defendant is allowed to pay money into court.

Every action against any person, for any thing done in pursuance of the act, must be commenced within three calendar months³ next after the fact committed; and the defendant may plead the general issue, and give the statute and the special matter in evidence at the trial, and that the same was done by authority of the statute; and if it shall appear to have been so done, or that the action was commenced after the time limited for bringing it, the defendant will be entitled to a verdict; and in that case, or in case of nonsuit, or discontinuance of the action after appearance, or if upon demurrer judgment shall be given against the plaintiff, the defendant will be entitled to double costs.

The right of action against a commissioner is founded upon the general rule of law, applicable to all actions of trespass against persons having a limited authority. If they do any act beyond that limit, they thereby subject themselves to an act of trespass; but, if the act done be *within* the

¹ 6 Geo. 4, c. 16, s. 42.

² Section 44.

³ Section 43.

scope of their authority, although it be done through an erroneous or mistaken judgment, they are then not liable¹ to such action. Thus, though it was formerly held that an action would lie against commissioners, for committing a person for not answering improper questions, or not acquiescing in a proper answer,²—it has been since decided, that commissioners were not liable to an action of trespass for committing a bankrupt, who did not answer to their satisfaction, notwithstanding he was discharged afterwards by *habeas corpus* on the ground of the court thinking the answers³ satisfactory; the commissioners having a discretionary power to commit, if the answers were not satisfactory to themselves. Neither will any action lie against commissioners for a commitment, which is bad only in consequence of a formal defect in the warrant.⁴

In an action brought against commissioners by a person apprehended on their warrant, for not obeying a previous summons requiring his attendance before them, it was held that it lay on the party summoned, having a lawful excuse for not attending, to prove the fact of his being prevented from attending by a lawful impediment.⁵

When the commissioners had incurred any costs, by defending an action brought against them for an act done in the strict discharge of their duty, it was held that they had a right to be compensated by the assignees; and the lord chancellor, in one case, would not restrain them from bringing an action to recover such costs, though the assignees had not received sufficient to pay the expenses of the commission, and had, in fact, no prospect of obtaining any more of the bankrupt's property.⁶

Where the bankrupt is confined in prison under previous process, the mere issuing of the commissioner's warrant does not amount to an imprisonment by him, until it has been in some way operative to the detention of the party, independently of the other process; for the warrant is only evidence of the *order* for imprisonment, and not of the imprisonment itself. But, if it operate to the confinement of the party within narrower bounds, it is then, coupled with proof of that fact, evidence of an imprisonment by the commissioner.⁷

Where the bankrupt had been already nonsuited in an

¹ Per Abbott C. J. *Doswell v. Impey*, 1 B. & C. 169, and see ante, 150, and seq.

² *Miller v. Seare*, 2 Bl. 1141.

³ *Doswell v. Impey*, 1 B. & C. 163.

⁴ *Bracey's case*, Comb. 391.

⁵ *Battye v. Gresley*, 8 East, 319.

⁶ Ex parte *Linthwaite*, 16 Ves. 234.

⁷ *Crowley v. Impey*, 2 Star. 261.

action against the commissioners in the King's Bench, on the ground that he was not prepared with evidence to prove the validity of a former commission, the court of Common Pleas, in an action for the same cause, stayed the proceedings until the plaintiff paid the costs of the former action.¹

Notwithstanding a petition from the bankrupt or any other person reflects on the conduct of a commissioner, he is not called upon, and indeed ought not, to make an affidavit in answer to the allegations contained in it: and this was the proper rule of conduct of the commissioners, even when they held their office at the mere pleasure of the lord chancellor, unless indeed they were served with the petition.² But now that each commissioner is appointed for life, and is declared to have all the powers of a court of record, it would be still more improper that a commissioner should interfere in any proceeding before a superior court, until called upon to certify any facts required for the information of the court.

¹ *Crowley v. Impey*, 8 Taunt. 407. 108; and see *Ex parte Steele*, 16 Moore, 460. Ves. 161. *Ex parte Scarth*, 14

² *Ex parte Husband*, 1 G. & J. Ves. 104, 15 Ves. 293.

CHAPTER VIII.

- SECT. 1. *Of the Accountant in Bankruptcy.*
2. *Of the Taxing Officer or Master.*
3. *Of the Registrars.*
4. *Of the Messenger.*
-

SECTION I.

Of the Accountant in Bankruptcy.

By the 5 & 6 Will. 4, c. 29, s. 3, the lord chancellor was empowered to nominate a fit and proper person to be "the accountant in bankruptcy," to superintend and control the care and management of the funds belonging to bankrupts' estates; and by s. 4, the funds standing in the name of the accountant general at the Bank of England, to the credit of any bankrupt's estate, were directed to be transferred into the name of the accountant in bankruptcy.

By 5 & 6 Vict. c. 122, s. 63, the accountant in bankruptcy is declared to be exempt from serving on juries or any parochial office; and by s. 92, the accountant is required, on or before the 1st of March in every year, if parliament be then sitting, or if not, within fourteen days after the commencement of the next session, to lay before parliament a return showing the total amount of monies paid into the Bank of England to the credit of the accountant, and of every bankrupt's estate during the year preceding and up to the thirty-first of December in that year, and also the total amount of monies paid out under every bankrupt's estate during the same period, by order of court, or of any judge or commissioner, and also the balances on the thirty-first of December in the Bank of England, standing to the credit of the accountant and of every bankrupt's estate.

By the general order¹ of Lord Lyndhurst, as soon as conveniently may be after every payment on account of a bank-

¹ 12. Nov. 1842, Rule 11, see post, app. & 3 M. D. & D. app. lxviii.

rupt's estate into the Bank of England, the accountant in bankruptcy must certify in writing to the proper official assignee, that such payment has been made, and the name of the bankrupt to the credit of whose estate the money has been placed in the books kept in the office of the accountant. The accountant and the Bank are authorised to make such further regulations, to be settled by one or more of the London commissioners, and subject to the approval of the lord chancellor, for facilitating the making of such payments, and certifying the same to the official assignee, as to them shall seem meet.¹

There are various other ministerial duties imposed upon the accountant in bankruptcy by the general orders, which are intended to serve as checks on the conduct of the official assignees, in the payment of dividends, and in the investment and drawing out of monies from the Bank of England; for which see the subsequent parts of this work relating to "dividends" and "official assignees."

By 7 & 8 Vict., c. 96, s. 56, the salary allowed to the accountant is declared to be in lieu of all fees and emoluments whatsoever, and directly or indirectly receiving any sum, either for commission, brokerage, or otherwise. It is declared, also, that from thenceforth the broker is to transact the brokerage business of the accountant's office, upon such terms as the accountant and any two of the commissioners of the court of bankruptcy to be appointed by the lord chancellor shall, with the approbation of the lord chancellor, determine; and the sum paid to the broker is to be charged by the accountant to the estate for which the investment or sale shall be made; and where such sum to be paid to the broker shall be determined, the lord chancellor may direct the payment, or any part of it, to be made from such time retrospectively, and prospectively, as to him may seem just.

SECTION II.

Of the Taxing Officer or Master.

By the 7 & 8 Vict., c. 96, s. 45, the lord chancellor is empowered to appoint some fit and proper person, being a barrister of not less than five years' standing at the bar, or who shall have practised as a pleader for not less than five years,

¹ Id. Rule 13.

or who shall have held the office of registrar or deputy registrar of the court of bankruptcy for not less than five years, or an admitted attorney of one of Her Majesty's superior courts at Westminster, or of the court of bankruptcy, in actual practice, of not less than five years standing on the roll of such court or courts, to be the taxing officer of the court of bankruptcy, and to be called the master of the said court, at such salary, not exceeding 1200*l.* per annum, as the lord chancellor shall think fit, and to be entitled to an annuity not exceeding two-thirds of such salary, if and when such officer shall be afflicted with some permanent infirmity disabling him from the due execution of his office; such salary or annuity, as the case may be, to be charged upon and paid (without any deduction except the tax on income) out of the same fund, and at the same times, and in like manner as the salaries or annuities of the registrars and deputy registrars of the court. The lord chancellor may fill up any vacancy in the office. The taxing officer holds his office during his good behaviour, and must discharge his duties in person, except where otherwise provided by the Act, or by any regulation to be made under the Act, and may be removed from his office by the lord chancellor for misconduct. The business to be transacted by this officer is declared to be, "the swearing of such affidavits as may be sworn before any commissioner, registrar, or deputy registrar of the court of bankruptcy, and the taxing of such costs taxable by any court of bankruptcy, by virtue of any statute now or hereafter to be in force, as the lord chancellor shall from time to time, by any general or other order direct, subject to review of the court authorised to tax the same; and the place, time, and manner, in which the same shall be conducted, shall be such as the lord chancellor shall by any such order direct."

By sect. 46, upon the taxation of any bills, there shall be paid to the master such sum as the master shall decide; not less than 1*s.*, nor more than 10*s.*; and also 4*d.* a folio, over and above the said sum of 10*s.*, for every folio exceeding 20 folios of such bill.

By sect. 47, all sums and fees received by the master are directed to be paid by him into the Bank of England, to the credit of the accountant in bankruptcy, to the account entitled "the secretary of bankrupts' account," after deducting such sum as the lord chancellor shall think fit for the expenses of the office.

By sect. 48, in case of sickness, or other unavoidable cause of absence for a longer period than two months at any one

time, the lord chancellor may give leave of absence to the master, by order in writing, and if necessary, appoint a deputy in his place during such time as expressed in the order.

SECTION III.

Of the Registrars.

Under the provisions of the 1 & 2 Will. 4, c. 56, s. 9, two registrars and eight deputy registrars were appointed to attend upon and assist the judges and commissioners of the court of bankruptcy, in London. They hold their respective offices during good behaviour, but are liable to be removed upon a certificate from the court of review, or one of the subdivision courts, of some sufficient reason to be named therein, for such removal.

By the general rules and orders¹ made in pursuance of the above act, the registrars are required to keep a roll or book, in which are to be enrolled the names of all attorneys and solicitors admitted in the court of bankruptcy. They are also required to keep at the registrar's office in Basinghall-street a proper alphabetical book, in which every attorney or solicitor admitted in the court of bankruptcy, and residing in London, or within ten miles thereof, must upon his admission enter his name and place of abode, or some other proper place in London, Westminster, or Southwark, or within one mile of the registrar's office, where he may be served with notices, &c., and he must make the like entry when he changes his place of abode. A deputy registrar is required to attend² upon each commissioner to take minutes of, to draw up, and have the charge of the proceedings before him, under the superintendence of the chief registrar.

By 5 & 6 Vict. c. 122, s. 73, the registrar for the time being acting in the court in Basinghall-street is required to keep books, in which he is to enter, in a form prepared by him, subject to the sanction of the London commissioners or the major part of them, and approved by the lord chancellor, an abstract of the proceedings filed in the court of bankruptcy, or such part thereof as shall be necessary to give a correct view of the estate to which such proceedings shall relate, and the management thereof, with an alphabetical index to each book, and a general alphabetical index to the whole of such books, which books shall be open to all concerned.

¹ Jan. 12, 1832. See app. in vol. 2, and 1 Dea. & C. app. xxiii.

² Rule xv.

By sect. 74, when any vacancy occurs in the office of clerk of enrollments to the court of bankruptcy, the duties and business of that officer are to be thenceforth performed by such registrar; and by sect. 75, all such fees, as are receivable under the 2 & 3 W. 4, c. 114, s. 6, are also to be thenceforth received by such registrar, and be paid by him, at such times as the lord chancellor shall direct, into the Bank of England, to the credit of the accountant in bankruptcy, intituled "the secretary of bankrupts' account."

Fees.] By 5 & 6 Vict. c. 122, s. 89, the fees, authorised to be taken by the chief registrar in respect of business transacted in London, are contained in the schedule¹ to the act, the amount of which is to be applied in payment of such salaries to clerks, ushers, and other under officers of the commissioners of bankruptcy, in London, as the lord chancellor may direct; and the yearly surplus to be divided between the two registrars and the deputy registrars in London in such proportions as the lord chancellor shall appoint.

By sect. 90, also, the fees received in the respective country district courts are to be paid over to the chief registrar in London, to be by him applied in payment of such salaries to ushers or other under officers of the country courts as the lord chancellor may direct, and the yearly surplus to be divided between the deputy registrars of the country courts in such proportions as the lord chancellor may appoint.

By the 7 & 8 Vict. c. 96, s. 49, the registrar and deputy registrar are to be paid in future only by salary, and are given an increase of 200*l.* a year, in addition to the increase of 200*l.* a year given them by the 5 & 6 Vict., c. 122, making now the salaries of the two chief registrars 1200*l.* each, of the deputy registrars in London 1000*l.* each, and the deputy registrars in the country 800*l.* each.

By sect. 50, all fees received by the chief registrar are to be paid by him, as the lord chancellor shall by any order direct, into the Bank of England, to the credit of the accountant in bankruptcy, to the account entitled "interest arising from the bankruptcy fund account," after deducting such sum as the lord chancellor shall think fit for stationery and other incidental expenses of the offices of the chief registrar and the court of review. The salaries to clerks, ushers, and other under officers of the court of bankruptcy heretofore paid by the chief registrar out of such fees, are directed to be thenceforth paid by the Bank of England out

¹ See post, vol. 2, App.

of the fund standing to such account, under such order as may be made by the lord chancellor.

By sect. 51, the lord chancellor may, on a petition presented to him for that purpose, order an annuity or clear yearly sum to be paid to any of the registrars, not exceeding two-thirds of his yearly salary, if he shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same.

By sect. 53, the court authorized to act in the prosecution of any fiat in bankruptcy, or any petition for protection from process, shall have power, whenever it shall seem expedient to such court, to direct a deputy registrar of such court to act in the prosecution of such fiat or petition for proof of debts, and the examination of parties or witnesses on oath, or for either of such purposes, subject to such rules and regulations as the lord chancellor shall from time to time think fit to make in that behalf; the travelling expenses of such officer to be settled by such court, and paid out of the estate of the bankrupt or petitioner, as the case may be; and such officer so acting shall have and exercise all the power vested in such court for proof of debts and examination of parties or witnesses, except the power of commitment. All such examinations are directed to be taken down in writing, and to be annexed to and form part of the proceedings under such fiat or petition, as the case may be.

By sect. 54, the deputy registrars are in future to be called registrars.

By the 5 & 6 Vict. c. 61, Her Majesty was empowered by her sign manual, from time to time appoint not exceeding twelve additional deputy registrars to act as such in the country, and to attend the commissioners of the district courts; which additional registrars are (by sect. 62) to hold their offices during their good behaviour, and to be subject to the like privileges, disabilities, and penalties as the deputy registrars appointed under the 1 & 2 Will. 4, c. 56. And on the death, resignation, promotion, or removal of either of the two registrars, the vacancy is to be filled up by one of the deputy registrars.

By sect. 63, the registrars and deputy registrars are declared to be exempt from serving on juries or any parochial office.

By the general order of 12th November, 1842, every sum directed to be paid under sect. 57 of the 5 & 6 Vict. c. 122, or sect. 47 of the 1 & 2 Will. 4, c. 56, is to be taken by the deputy registrar of the court authorised to act in the prose-

cution of the fiat under which the sum is payable; he must keep an account of all such sums, which must be certified by the commissioner to correspond with the number of sittings, and be paid by the deputy registrar monthly into the Bank of England, or in the country into one of the branch banks, to the credit of the accountant in bankruptcy, to be carried to the account entitled "The secretary of bankrupts' account," and the voucher for such payment must be produced to the commissioner within one week afterwards.

The deputy registrar attending each commissioner is required to take minutes and have the charge of all proceedings before him, and otherwise assist in the business of the court; subject to the control of the commissioner.¹ He is also required to keep the quarterly account rendered by the official assignee attached to his court, which account is to be open to the inspection of creditors, and to give notice in the court of such account having been delivered, and that any creditor applying to the court may inspect the same, without fee, at such convenient time as may be appointed by the court.

Where there is any doubt as to the right of a deputy registrar to receive any portion of his salary,—as where he resigns his office, and takes the benefit of the insolvent act,—it seems that the lord chancellor is the proper tribunal to apply to for any order on the subject.²

It has been determined by the Irish court of chancery, that the registrar of the commissioner of bankrupts' court *there* is an officer of the court of chancery, and, as such, is entitled to privilege from arrest under a *ca. sa.*; though the court will discountenance applications for such protection of privilege on the part of its officers.³

SECTION IV.

Of the Messenger.

The messenger is the officer of the commissioners, as well as an officer of the court of bankruptcy,⁴ and his duty is to execute promptly the summonses and warrants directed to him by them, whether for the seizure of the bankrupt's property, or for summoning or apprehending the bankrupt, or

¹ General rules and orders of 12th Nov., 1842., Rule 8. See post, app.; and 3 M. D. & D. app. p. lvi.

² Ex parte *Bousfield*, 4 Dea. 45.

³ Re *Collins*, 1 Sausse & Scully, 73.

⁴ Ex parte *Shaw*, 2 G. & J. 77.

other persons, during the different proceedings under the fiat. For his trouble in the discharge of these duties, he is entitled to certain fees, which are taxed by the commissioners and are paid out of the bankrupt's estate.

Seizure of the bankrupt's property.] The messenger is amply protected in the discharge of his duty, if he behaves himself properly, and does not exceed the limits of his authority, as defined in the various enactments of the statute. He may, by warrant under the hand and seal of a commissioner, "break open¹ any house, chamber, shop, warehouse, door, trunk or chest of *any bankrupt*, where the bankrupt or any of his property shall be reputed to be, and seize upon the body, or property, of the bankrupt." But this power does not authorize him to break open any house, except that of the bankrupt.² And if the bankrupt be in prison and in custody, he may seize *any property*³ (except his necessary wearing apparel) in the custody or possession of the bankrupt, or of any other person, in any prison or place where the bankrupt is in custody.

If any of the bankrupt's property⁴ is in *Ireland*, the messenger may in the same way seize the property there; but the warrant in that case must be verified upon oath by the solicitor under the fiat, before the mayor or other chief magistrate of the city or town where or near to which the fiat is executed, and be also verified under the common seal, or the seal of office of such mayor or magistrate; and the messenger must also depose upon oath, before a justice of peace residing in the county where the bankrupt's property shall be reputed to be, that he is the person named in such warrant.

If, in the execution of the commissioner's warrant, it becomes necessary to have access to any house or place of the bankrupt in *Scotland*,⁵ the warrant, after being verified upon oath as before mentioned, must be backed or indorsed with the name of a judge ordinary, or justice of the peace in Scotland, which will be then sufficient authority to the messenger, and all officers of the law in Scotland, to execute it within the county or burgh wherein it is so indorsed.

Where there is reason to suspect that property of the

¹ 6 Geo. 4, c. 16, s. 27.

² *Edge v. Parker*, 8 B. & C. 700.

³ There is an omission in this part of the clause, in not confining

the seizure to the property of *the bankrupt*; but this of course must necessarily be inferred.

⁴ 6 Geo. 4, c. 16, s. 28.

⁵ 6 Geo. 4, c. 16, s. 30.

bankrupt is concealed,¹ the messenger may then obtain a search-warrant from the commissioner authorized to act in the prosecution of the fiat, and may execute it in the same manner, and is entitled to the same protection, as is allowed by law in the execution of a search-warrant for stolen property. But such warrant can only be granted to the messenger; and where it was delivered to a constable, it was held to be illegal, and that he could not protect himself by delivering a copy to the plaintiff.²

The messenger, upon taking possession of the bankrupt's effects, must forthwith take an *inventory*³ of them, but no appraisement is to be made, or other expenses incurred, without the special direction of the commissioner, until after the appointment of the creditor's assignees; and the inventory, with the articles contained in it, must, as soon as assignees are chosen, be delivered up to them. None of the property should be left in the bankrupt's power, and care should be taken that no document is lost. The usual way of securing the books and papers is to put them into a box, or some other safe place of deposit, sealing it up with the messenger's seal, as well as with that of the bankrupt, and thus to keep them until assignees are chosen. The messenger is bound to account faithfully to the assignees for the property of which he has so possessed himself, as well as to the assignees under any subsequent fiat, if the first is superseded.⁴

When the messenger has once taken possession of the bankrupt's property, he should not quit possession upon the representation of any person claiming the property as his own; for if he quits possession, there may be some difficulty in his resuming it; as it is a question, whether, after having once abandoned it, the warrant of the commissioner is not spent.⁵ Perhaps the safest mode of proceeding, in such a case, would be to get a fresh warrant from the commissioner; since an attachment will not be granted, under these circumstances, against a person for refusing to permit the messenger to take a⁶ second possession.

Indemnity as to Action.] As the messenger was formerly put to much expense and trouble from actions being brought

¹ 5 & 6 Vict. c. 122, s. 30.

² *Sly. v. Stevenson*, 1 Carr. & P. 404.

³ General order of 12th January 1832. Rule xxviii. See vol. ii. App.; and see 1 Deac. & C. App. xxviii.

⁴ *Ex parte Shaw*, 2 G. & J. 73.

⁵ Per Lord Eldon, *ex parte Page*, 1 Rose, 2.

⁶ Per Lord Eldon, *ex parte Page*, 1 Rose, 2, and 17 Ves. 59.

against him, for the mere purpose of trying the validity of the commission, a protection is now given to him similar to that which the law affords to constables in the execution of their duty. He seizes the property of the bankrupt, indeed, at his own hazard; but no action can be brought against him for any thing done in obedience to the commissioner's warrant prior to the choice of assignees, unless a previous demand¹ in writing is made by the party, or his attorney, of the perusal and copy of the warrant, nor unless the same hath been refused or neglected for six days after being made. And if, after compliance with such demand, any action be brought against the messenger, without making the petitioning creditor a defendant also, the jury, on proof of such warrant at the trial, must give their verdict for the defendant, notwithstanding any defect of jurisdiction in the commissioner. But, if the action be brought against the petitioning creditor as well as the messenger, the jury, on proof of the warrant, are equally bound to give their verdict for the messenger; and if a verdict be given against the petitioning creditor, the plaintiff may recover his costs against him, so as to include the costs which such plaintiff is liable to pay to the messenger. And proof in such an action, that a defendant is the petitioning creditor, renders him² liable to the same extent, as if the act complained of in the action had been committed by the defendant. As this protection however of the messenger is only given to him for acts done *prior* to the choice of assignees, he should in all doubtful cases, when the action is brought *after* the choice, secure himself by taking an indemnity from the assignees.

The messenger is also within the protection of the 44th section of the 6 Geo. 4, c. 16, which provides for the limitation of actions against any person, for any thing done in pursuance of the act, and for double costs in case the defendant succeeds in the action.

Where the messenger employed an agent to take possession of the bankrupt's effects, and the agent absconded with a considerable sum of money, it was held that the messenger was not liable for the amount in an action for money had and received, no negligence, or want of proper caution, having been attributed to him.³

Besides the above protection afforded to the messenger by statute, any obstruction that he may meet with in the execution of the warrant of the commissioner will be con-

¹ 6 Geo. 4, c. 16, s. 31.

² Section 32.

³ *Raw v. Cutton*, 9 Bing. 96.

² *Moore & S.* 123.

sidered a contempt of the court of review; and the persons so obstructing him will be liable to an attachment as for a contempt, notwithstanding the messenger may have acted under the immediate authority given by the statute, and not under any previous order of the court.¹ Any person, also, who indemnifies another against the consequences of turning a messenger out of possession of property seized by him, is equally guilty of contempt;² and it is no justification for resisting him, that the warrant was illegal.³ In one case, where the captain of a ship turned the messenger out of possession of the bankrupt's goods, which were laden on board and formed part of the ship's cargo, the lord chancellor ordered that he should give security for answering to the assignees, to the amount of the interest which they could prove the bankrupt had in the cargo, at the time the messenger took possession of it.⁴ And, generally, if the captain of a ship refuse to deliver up the bankrupt's goods to the messenger, the court of review will make an order for the goods to be delivered, upon payment of freight, and indemnifying the captain against the rights of other persons.⁵ Where goods were seized by a messenger as the property of the bankrupt, the lord chancellor in one case refused to order them to be delivered up to a petitioner merely claiming them as his own; the proper remedy being an action at law against the messenger.⁶

His costs.] By the general order⁷ of 12 January, 1832, a table of fees is specified, to which the messenger is entitled, as a remuneration for the execution of the duties imposed on him.

The petitioning creditor is, in the first instance, personally answerable to the messenger for his charges before the party be declared a bankrupt,⁸ as well as for all his costs before the choice of assignees; but this liability is only for *necessary* charges and expenses. Therefore, where a messenger took an unnecessary and fruitless journey to the Isle of Man, without any authority from the petitioning creditor, it was held that he had no claim in this respect against the petitioning creditor.⁹ After assignees are chosen, *they* are then

¹ Ex parte *Page*, 1 Rose, 1. Ex parte *Tifner*, 1 Atk. 136. Ex parte *Dixon*, 8 Ves. 104.

² Ex parte *Dixon*, 8 Ves. 104.

³ Ex parte *Tifner*, ex parte *Page*, ante.

⁴ Ex parte *Dixon*, 8 Ves. 104.

⁵ Molloy, 253. Eq. Ca. Ab. 98.

⁶ Ex parte *Craggs*, 1 Rose, 25; but see ante, p. 16.

⁷ Rule xxix. See vol. ii. App.; and see 1 Deac. & C. xxviii.

⁸ *Burwood v. Kant*, 2 Carrington & P. 123.

⁹ *Bilings v. Waters*, 1 Star. 363.

liable to him for all his subsequent costs,—notwithstanding even the fiat is annulled, and they have not attended any meeting of the commissioner, or received any effects under the fiat.¹ But the assignees are not answerable to him for costs due before the choice of assignees.² The assignees are also presumed to know, that the messenger has a claim for the payment of his bill out of the bankrupt's effects, and ought therefore to reserve sufficient funds to satisfy it; and it is no objection to his claim against them, that he has neglected to make his demand until after a final dividend.³ The costs of the messenger are taxable in the same way as the costs of the solicitor. But where a messenger's bill had been paid five years, and there was no recent discovery of any fraudulent charge contained in it, an order was refused for the taxation of it.⁴ The messenger is not obliged to bring an action for the recovery of his fees, but is entitled to proceed by the more summary remedy of a petition to the lord chancellor;⁵ and in either proceeding it is sufficient to prove the messenger's appointment, and that the charges are reasonable, without proving express employment, or recognition of him as messenger by the assignees.⁶

The solicitor to the fiat is not in general personally liable to the messenger for the payment of his costs.⁷ But if the solicitor agree with the petitioning creditor to work a fiat for a sum certain, and receive a great part of that sum, *he* will then be personally liable to the messenger, as for money had and received,⁸—though the petitioning creditor, in such a case, will not be exonerated from his liability to the messenger, without the express consent of the messenger to discharge him.⁹

¹ Ibid. Ex parte Hartop, 9 Ves. 109.

² Burwood v. Felton, 3 B. & C. 43.

³ Ex parte Hartop, 1 Rose, 449.

⁴ Ex parte Willmet, 3 D. & C. 364.

⁵ 9 Ves. 109. 1 Rose, 450.

⁶ Hamber v. Purser, 2 Cr. & M. 209. 4 Tyr. 41.

⁷ Hartop v. Jukes, 2 M. & S. 438. Hart v. White, 1 Holt, 376.

Ex parte Burwood, 2 G. & J. 70.

⁸ Hartop v. Jukes, supra; and see ex parte Hartop, 12 Ves. 349.

⁹ Hart v. White, 1 Holt, 376.

CHAPTER IX.

OF THE PROOF OF DEBTS.

- SECT. 1. *Of Debts in general, and herein of the Rights and Duties generally of Creditors.*
2. *Of the Creditor's Election.*
3. *Time of Proof.*
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SECTION 1.

Of Debts in general, and herein of the Rights and Duties generally of Creditors.

There are some general rules applicable to all cases of the proof of debts under the fiat, which should be considered previously to admitting any creditor to prove. The first consideration is, when the debt accrued, or was contracted. Before the statute 46 Geo. 3, c. 135, s. 2, the law was, that the debt must have *accrued before the act of bankruptcy*, in order to enable the creditor to prove it;¹ a rule which was often attended with inconvenience, and not unfrequently productive of injustice. But by a provision of that statute, which is incorporated in the 47th section of the 6 Geo. 4, c. 16, every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing of the commission, may, notwithstanding any prior act of bankruptcy committed by the bankrupt, be admitted to prove the same, provided he had not, at the time it was contracted, *notice* of such act of bankruptcy. It has been decided in one case, that the act of bankruptcy meant in this section was the act of bankruptcy *on which the commission was issued*, and that if the debt was contracted before the act of bankruptcy on which the commission was issued, though after notice of a prior act of bankruptcy, it might nevertheless be proved under the commission.² But the court of review has lately held the contrary.³

Time of contracting debt.] It is also no objection to the proof of a debt, (except in the case of the petitioning creditor), that it was contracted with the bankrupt after he left off trade.⁴ But a debt which is barred by the *statute of limitations* cannot be proved, although the bankrupt admit that he contracted the debt and never paid it.⁵ But the statute does not run against the creditor, after the issuing of the fiat.⁶

Where a debtor, in 1831, agreed with his creditor to pay him a composition of 5s. in the pound upon the amount of

¹ *Bamford v. Burrell*, 2 B. & P. 1.² *O'Brien v. Grieson*, 2 Ball & B. 334.³ *Ex parte Rowson*, 2 M. & A. 479.⁴ *Ex parte Sharp*, 3 M. D. & D. 496.⁵ *Meggott v. Mills*, 12 Mod. 159.⁶ 1 *Ld. Raym.* 297.⁷ *Ex parte Doudney*, 15 Ves. 479.*Ex parte Seaman*, *Id.* *Ex parte Roffey*, 2 Rose, 248.⁸ *Ex parte Ross*, 2 G. & J. 46, 336.

his debt, by instalments, and after the payment of the first instalment he made default in payment of the balance, but in February, 1839, being pressed for the payment of the demand of the creditor, he made a payment of 100*l.* in part of the balance of the composition, and required a receipt, as "for a composition of 5*s.* in the pound upon the balance of account owing by him," which the creditor declined signing, but acknowledged the payment of the 100*l.*; and, in September 1839, the debtor became bankrupt: it was held that the agreement for the composition did not preclude the creditor from proving for the balance of the original debt, and that it was not barred by the statute of limitations.¹

A debt, contracted by the bankrupt's wife before her coverture, may likewise be proved under a fiat against him; for when a woman marries, all her debts become, by the marriage, the debts of her husband.²

What debts provable.] Whenever a debt is barred by the certificate, it is (with only one or two exceptions, which will be noticed in a subsequent chapter)³ provable under the fiat; and the converse of this proposition likewise holds true.⁴ But before a debt can be proved, it must either be actually liquidated and ascertained, or capable of being so;⁵ and it must also be contracted for a lawful consideration.⁶

The amount of a proof on a *debitum in presenti, solvendum in futuro*, is not subject to any deduction in respect of rebate; which only applies upon payment of a dividend.⁷

Although the debt of a creditor may have been inserted in the schedule of a party who has taken the benefit of the insolvent act, the creditor may prove the debt under a subsequent fiat against the debtor.⁸

Where a creditor, after the issuing of a fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee.⁹

¹ Ex parte *Bateson*, 1 M. D. & D. 289.

² *Miles v. Williams*, 1 P. Wms. 249.

³ Vide post. "Of the Effect of the Certificate."

⁴ 1 Atk. 119. *Bamford v. Burrell*, 2 B. & P. 11.

⁵ *Goddard v. Vanderheyden*, 3 Wils. 262. *Uttersen v. Vernon*, 3 T. R. 546.

⁶ See post, sect. 25. "Of Illegal and Void Debts."

⁷ Ex parte *Hill*, 2 Dea. 249.

⁸ Ex parte *Fenwick*, 2 M. & A. 681, 2 Dea. 27. See *Jellis v. Mountford*, 4 B. & Ald. 256. Ex parte *Barrington*, 1 Dea. 3. Ex parte *Sidebotham*, 4 D. & C. 698.

⁹ Ex parte *Dickenson*, 2 D. & C. 520.

How proof operates.] Proof of a debt has been decided in one case to be equivalent to payment.¹ But this position was first doubted,² and afterwards controverted, by Lord Eldon, who held that proof was only payment, when it produced payment.³ Proof of a debt, however, is so far binding on the creditor, that if he has a security or lien on any property of the bankrupt, and proves for the whole debt, without noticing the security, he will not be allowed afterwards to withdraw his proof, and avail himself of his security or lien,⁴—but must deliver up the security, or property on which he has a lien, for the general benefit of the creditors.⁵

The proof of a debt does not estop the creditor from disputing the validity of the fiat in an action at law, or from applying to have it annulled.⁶

By 6 Geo. 4, c. 16, s. 8, if any creditor, after a docket struck against a bankrupt, receives from him any money, gift, satisfaction, or security for his debt, or any part of it, whereby the creditor may receive more in the pound in respect of his debt than the other creditors, he thereby forfeits his whole debt, and is also compellable to deliver up such money, &c., or the full value thereof, to such person as the commissioner shall appoint.

The aim of the legislature, therefore, being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every description must come in upon equal terms; nor will the nature of their demands make any difference, unless they have obtained actual execution against the bankrupt, or have taken some pledge or security from him, before the date and issuing of the commission, and before notice of an act of bankruptcy.⁷ The 108th section of the 6 Geo. 4, c. 16, accordingly declares, that no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon, any part of the property of the bankrupt before the bankruptcy.⁸

¹ Ex parte *Watson*, Buck. 456.
Ex parte *Smith*, Ibid. 492. Ex
parte *Hornby*, Ibid. 351.

² Ex parte *Hunter*, Buck. 556.

³ Ex parte *Moore*, 2 G. & J. 166.

⁴ *Grugeon v. Gerrard*, 4 Young
& C. 119.

⁵ Ex parte *Dournes*, 18 Ves. 290.

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¹ Rose, 96. Ex parte *Solomon*, 1
G. & J. 25.

⁶ *Stewart v. Rickman*, 1 Esp.
108. Ex parte *Bonsor*, 2 Rose, 61.

⁷ 2 & 3 Vict. c. 29.

⁸ And see post, sect. 5, as to
judgment creditors.

Creditors holding securities.] When a creditor comes to prove his debt, he is obliged to swear whether he has a security for it, or not; and if he has a security on the bankrupt's property, and he insists upon proving, he must either deliver it up for the benefit of the creditors,¹ or have the value previously ascertained by the sale of it.² Thus, an annuity creditor, who has a policy of assurance assigned to him by the bankrupt to secure the payment of the annuity, cannot prove without a sale of the policy.³ So a security given by the bankrupt to a creditor on an expectancy, as next of kin, in the event of a person dying intestate, must be noticed by the creditor in his proof.⁴ If it be, however, a joint security from the bankrupt and another person, he may then come in for his whole debt under the fiat, without being compelled to deliver up the joint security;⁵ and he is in that case entitled to take his dividend upon the whole of his demand from the bankrupt's estate, and to recover what he can from the co-surety, provided he does not receive more than 20s. in the pound in the whole.⁶ And the same rule holds, where the creditor has a distinct security from a third person for the same debt; for the deduction of such a security is never made from the claim of the creditor, unless it is pledged with the creditor as the property of the bankrupt.⁷ It has been determined, also, that where two partners made a mortgage of the joint estate for a joint debt, and jointly and severally covenanted to pay the debt, the creditor could prove his whole debt against each separate estate, without giving up the mortgage;⁸ a decision which certainly seems to go somewhat beyond the former cases on this subject. Every security should, however, be produced at the time of proving the debt, in order that the commissioner may mark it as having been exhibited. And if a creditor, holding the bankrupt's acceptance, proves his debt without stating that fact to the commissioner, and there are circumstances of suspicion, which make it fit that the assignees should again have an opportunity fully to examine into the debt, the proof will be ordered to be expunged, giving him liberty, however, to go again before the commissioner and tender his proof.⁹

It has already been observed,¹⁰ that where a party proves

¹ Ex parte *Grove*, 1 Atk. 105.
Ex parte *Clark*, 1 M. D. & D. 622.

² Ex parte *Smith*, 2 Rose, 64.
Ex parte *Reay*, 4 D. & C. 525. Ex
parte *Ellis*, id. 370.

³ Ex parte *Tierney*, Mont. 78.

⁴ Ex parte *McTurk*, 2 Dea. 58.

⁵ Ex parte *Bennet*, 2 Atk. 528.

⁶ Ex parte *Coplestone*, 3 Dea. 546.

⁷ Ex parte *Parr*, 1 Rose, 76. Ex
parte *Goodman*, 3 Madd. 373.

⁸ Ex parte *Shepherd*, 2 M. D. & D.
204.

⁹ Ex parte *Hossack*, Buck. 390.

¹⁰ *Ante* p. 177.

his debt, on the footing of holding no security, he will not, in general, be permitted to withdraw his proof and set up a security, unless he is ignorant of the existence of the security.¹ And where he obtains the common order for the sale of a security, with liberty to prove for the deficiency, he cannot afterwards abandon that order, and claim to prove for his whole debt, retaining his security, although the order has not been acted upon, and he was not aware of his rights when the order was obtained.²

Where the creditor thinks that a security pledged with him by the bankrupt is not of equal value with the debt, he may apply to have it sold, and to be admitted as a creditor for the residue; and it makes no difference in this respect, whether the security is a real or personal one; for all personal securities, such as bonds and bills of exchange, may be directed to be sold in the same manner as an estate.³ And if the security is really of less value than the debt, and the creditor is desirous of voting in the choice of assignees, the court will sometimes permit him to prove, without giving up the security; but then the value of the security or pledge must be deducted, and he can only prove for the difference;⁴ and the court will impose such terms upon him, as that justice may be done to the estate.⁵ For if he proves for the whole amount of his debt, and receives a dividend upon his proof, he forfeits his security.⁶ Where the security consists of bills, if the creditor is willing to take them at their value on the face of them, the estate in that case cannot be damaged, as they may produce less, but cannot produce more; and his proof must, of course, be admitted for the difference.⁷ And the same rule applies where the value of the security is admitted by all parties;⁸ but if, in this case, the sale of the security produces more than the value put upon it, the surplus must be carried to the estate, and not applied in reduction of the creditor's proof.⁹ And though the right to retain the security is disputed, yet, if the value of it bears a very small proportion to the amount of the debt, the creditor will be allowed to prove for the difference, upon giving security to deliver up the property, if it should turn out that he is not by law

¹ *Grugeon v. Gerrard*, 4 Younge & C. 119.

² *Ex parte Davenport*, 1 M. D. & D. 622.

³ *Ex parte Hillier*, 1 C. B. L. 138; and see post.

⁴ *Ex parte Amphlets*, Mont. 77.

⁵ 2 Jac. & W. 221. *Ex parte*

Nunn, 1 Rose, 322. *Ex parte Greenwood*, Buck. 323.

⁶ *Ex parte Eggington*, Mont. 72.

⁷ *Ex parte Martell*, 1 Rose, 329. Per Lord Eldon.

⁸ *Ex parte Nunn*, *Ibid.* 322.

⁹ *Ibid.*

entitled to retain it.¹ But where the creditor holds property under what was clearly a *preference*, such an order will not be made.² In one case where the obligor of a bond, which had been pledged by the bankrupt with the creditor, had left this country, and the value of it was very uncertain, the Vice-chancellor ordered, that the creditor might prove his whole debt, and take such proceedings as he might be advised to compel payment of the bond, accounting to the assignees for any surplus recovered on the bond.³

And in some cases where the creditor has been permitted to prove, without deducting the security, and it is uncertain what the security will eventually realize, the court will order that the dividends upon the proof shall be paid into the bank, subject to further order.⁴ But where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor, as a security for a debt due from the bankrupt, it was held that the creditor might prove for the whole debt, without giving up the security, it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife.⁵ It seems that the proof of a debt cannot be resisted because the creditor has property belonging to the estate in his possession, that being only a ground to restrain payments of the dividends.⁶ So also, the proof of the balance of a debt, which must at all events be due, is not to be rejected or deferred because there is a question (as to the legality of a part payment of it) to be tried between the bankrupt's estate and the creditor, which the assignees in their discretion may, or may not, put into a course of trial—but which the creditor cannot himself initiate; though it is proper that no dividend should be paid on that proof till the question is determined.⁷ And where the bankrupt had bought of the creditor large quantities of wines for

¹ *Ex parte De Tastet*, 1 Rose, 324; and see *Ex parte Smith*, 2 Rose, 65. The order in *ex parte De Tastet* was, that the creditor should give security to deliver up the property, if the commissioners should be of opinion that he was not entitled to retain it; and that the creditor should not reverse their adjudication, by an application afterwards to the lord chancellor. The reasonableness of imposing these terms, however, seems to be very questionable; for in a complicated case of law and fact, it was somewhat hard to tie the creditor down

to the decision of the commissioners, without any appeal from their decision to the lord chancellor, or without, at least, permitting him to take the opinion of a judge and jury.

² *Ex parte Barclay*, 1 G. & J. 272. *Ex parte Smith*, 3 Bro. 46; and see post. Section 6.

³ *Ex parte Smith*, 2 G. & J. 105.

⁴ *Ex parte Smyth*, 3 Dea. 597.

⁵ *Ex parte Hedderly*, 2 M. D. & D. 487.

⁶ *Ex parte Dobson*, 1 M. & A. 666. 4 D. & C. 69.

⁷ *Ex parte Ackroyd*, 1 G. & J. 391.

stipulated prices, and at long credit, and the assignees sold the wines by auction at considerable loss; in consequence of which the commissioner made a reduction in the creditor's proof, on the ground that the prices charged for the wines were too high: it was held that he was not justified in making such reduction.¹ Where the bankrupt had embezzled various sums of money belonging to a creditor, and had made false entries and alterations in his cash book to conceal the deficiency in his accounts, and the creditor indicted the bankrupt for the embezzlement, but failed in convicting him, through the inability to prove an embezzlement of any specific sum; it was held that the creditor, having *bonâ fide* prosecuted the indictment against the bankrupt, and used his best endeavours to convict him of the felony, was entitled to prove for the whole amount which the bankrupt had embezzled.²

When a creditor applies to prove, though he is not bound to criminate himself, he is nevertheless bound to answer all the lawful inquiries of the commissioner respecting his claim upon the bankrupt.³ Therefore, where a creditor was charged by the bankrupt with the receipt of several sums of money, and refused, upon his examination before the commissioners, to make any disclosure as to the receipt and application of them, the lord chancellor would not allow him to prove his debt under the commission; as it was not necessary that he should, in the first place, discharge himself of the sums of money traced to his hands.⁴ But it seems that the proof of a debt cannot be rejected by a commissioner merely because there are no entries relating to the debt in the books of the party seeking to prove;⁵ nor because the deposition of the creditor is not supported by the evidence of a third person, where the debt is admitted by the bankrupt.⁶ And where the bankrupt had absconded to America, and the commissioner had expunged the proof of a debt, relying chiefly on the evidence afforded by the entries in the bankrupt's books, the proof was ordered to be restored, as evidence of this description ought not to have countervailed the oath of the creditor.⁷ But where a bankrupt had absconded with his books of account, and had never surrendered to the fiat, and a creditor applied to prove on two bills, one for 200*l.*, and the other for 123*l.*, the consideration for which he

¹ *Ex parte Reay*, 3 D. & C. 175.632. *Ex parte Pownall*, 2 M. & A.² *Ex parte Jones*, 3 D. & C. 525.

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³ *Ex parte Steele*, 16 Ves. 161.⁶ *Ex parte Chapman*, 3 Dea. 273.⁴ *Ex parte Symes*, 11 Ves. 521.⁷ *Ex parte Boler*, 1 M. D. & D.⁵ *Ex parte Beasley*, 2 M. & A.

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alleged to be goods sold by him to the bankrupt, but no entry appeared in the creditor's books of the sale of those goods, and he adduced no evidence of the fact beyond his own statements, the commissioner, under these circumstances, was held to be justified in rejecting the proof.¹ Where the bankrupt was a member of a joint stock bankruptcy company, and was indebted to them in a large balance, it was held that the company had a right of proof against him for the balance due, notwithstanding the company were indebted to various other persons.²

A creditor, who has not proved, is not entitled to examine the petitioning creditor before the commissioners.³

A *specialty creditor* has the same right under the bankruptcy of the *heir* of his debtor, as if the heir had not become bankrupt; and may, therefore, follow the real assets of his debtor, or their specific produce, in the hands of the assignees.⁴

Creditors, who come in under the fiat, are liable to contribute, in proportion to the amount of their debts, to all the lawful expenses of the assignees in recovering the bankrupt's property; and there is no difference, in this respect, between creditors who prove by affidavit, and those who prove in person.⁵ But no creditor, being out of England, and proving by affidavit, is liable to pay any contribution on account of his debt.⁶

As an appeal lies to the court of review, on petition, from every determination of a commissioner,—if a creditor, therefore, upon his proof being rejected by them, considers himself aggrieved, his proper course is to petition the court to be admitted to prove.⁷ The petitioner must state the grounds, if any were assigned, on which the proof was rejected by the commissioner;⁸ and if it has been improperly rejected, the petitioner will be allowed costs out of the estate.⁹ But he cannot petition to prove a larger debt than what he offered to prove before the commissioner.¹⁰ And where a creditor petitions to prove a debt, which is not in its nature proveable, the petition will be dismissed with costs, notwithstanding the commissioner may have rejected the proof for an insufficient

¹ *Ex parte Knight*, 1 Deac. 408.

² *Re Caldecott*, 2 M. D. & D. 368.
Ex parte Wallis, id. 201.

³ Section 46.

⁴ *Ex parte Morton*, 5 Ves. 449.

⁵ *Ex parte Leathwaite*, 16 Ves. 234.

⁶ 6 G. 4, c. 16, s. 46.

⁷ *Clarke v. Capron*, 2 Ves. Jr. 666.

⁸ *Ex parte Worth*, 2 D. & C. 4.
But see *ex parte Mudie*, 2 M. D. & D. 490.

⁹ *Ex parte Birks*, 2 M. & A. 208, note.

¹⁰ *Ex parte Fry*, 3 Mad. 132.

reason.¹ Under special circumstances, however, a creditor may petition to prove, in the first instance, without tendering his proof previously to the commissioner;² though such an application should not in general be made, until the commissioner has rejected the proof.³ And the court will make no order for payment of a debt, in anticipation of a probable objection that may be made to the proof by the commissioner.⁴ Where the commissioner has rejected a proof tendered to him, the court of review may direct it to be placed on the proceedings at once, without referring it back to the commissioner, and the same, although the proof has not been rejected, but only adjourned.⁵ And where the court makes an order that a creditor shall be permitted to prove for a certain sum, the commissioner cannot decline to receive the proof, until a private meeting has been called to inquire into the nature of the debt.⁶ If the commissioner also has improperly admitted proof of a debt, redress must be sought by the assignees, by petition, to expunge it. But by 1 & 2 Will. 4, c. 56, s. 30, any commissioner of the court of bankruptcy in *London* may adjourn the examination of a proof of debt to be heard before a sub-division court, which may determine the same, without any appeal, except upon a matter of law or equity, or the refusal or admission of evidence. But in case both parties consent to have the validity of any debt in dispute tried by a jury, an issue must be prepared under the direction of the commissioner or subdivision court, and sent for trial before the court of review; and if one party only applies for such issue, the commissioner or subdivision court are to decide whether or not such trial shall be had, subject to an appeal as to such decision, by the court of review. But all matters of law or equity, or of the refusal or admission of evidence in the case of any disputed debt, may be brought before the court of review by the party who thinks himself aggrieved;⁷ and in that case, the proof of the debt must be suspended, until such appeal is disposed of, and a sum not exceeding any expected dividend on the debt in dispute in such proof may be set apart in the hands of the accountant in bankruptcy, until such decision be made; and in like manner there may be an appeal from the court of

¹ *Ex parte Worthington*, 1 D. & C. 288.

² *Ex parte Moody*, 2 Rose, 414. *Ex parte Smith*, 1 G. & J. 74.

³ *Ex parte De Tastet*, 1 V. & B. 280. *Ex parte Morson*, 2 Dea. 245.

⁴ *Ex parte Beaumont*, 1 D. & C. 360.

⁵ *Ex parte Whitworth*, 2 M. D. & D. 158.

⁶ *Ex parte Richardson*, 3 Dea. 377.

⁷ 1 & 2 W. 4, c. 56, s. 31.

review to the lord chancellor, if it is lodged within one month from the determination of that court.¹ In case the appeal is allowed in relation to the admission or refusal of evidence, the proof of the debt must be again heard by the commissioner or subdivision court, and the evidence must be then admitted or rejected accordingly. If the court of review should allow the proof, the creditor is not entitled to the interest made by the investment of the amount of the expected dividend.² If any creditor, or other person, wilfully and corruptly swears falsely³ in any deposition or affidavit, or (being a Quaker) makes a false affirmation, he is liable to be prosecuted for perjury.

The 6 Geo. 4, c. 16, s. 135, declares, that that statute is to be construed beneficially for creditors,⁴ in conformity with an opinion formerly expressed by Lord Mansfield, as to the interpretation of the former bankrupt laws; namely, that they should receive a construction favourable for creditors, and for the suppression of fraud.

SECTION II.

Of the Creditor's Election to sue the Bankrupt, or to prove his Debt.

A creditor, by proving his debt under the fiat, was not formerly concluded to have made an absolute election not to proceed at law against the bankrupt; though the lord chancellor would, on application, have put him to his election, either to come in under the fiat, or to proceed with his action. Some refined distinctions, too, appear to have been drawn in the different cases (which are somewhat at variance with each other), as to the particular period of putting him to his election—whether before, or after, a dividend was declared—or whether there should not, at the least, be funds in the hands of the assignees sufficient to make a dividend.⁵ If the creditor elected to proceed with his action, he was still allowed to prove his debt, for the purpose of assenting to, or dissenting from, the certificate; as the certificate would, of

¹ Section 32.

² *Ex parte Jamieson*, 2 Dea. 6.

³ Section 94. Formerly, besides the punishment for perjury, he was liable to pay double the sum sworn to, or affirmed to be due, to be di-

vided amongst the bankrupt's creditors. See 5 G. 2, c. 30, s. 29. *Holmes v. Walsh*, 7 T. R. 458.

⁴ 1 Burr. 474.

⁵ C. B. L. 134.

course, operate to the discharge of the bankrupt from that action, as well as all his debts contracted before the act of bankruptcy.¹ A *petitioning* creditor, however, was always held to have determined his election; for if he had been permitted to proceed at law, after taking out the commission, the commission itself must have been superseded,—which would have affected all the creditors who had proved debts under it.²

But now, by 6 Will. 4, c. 16, s. 59, (which adopts the provisions of the 49 Geo. 3, c. 121, s. 14), any creditor, who has brought an action, or instituted a suit, against the bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the fiat, is not permitted to prove, or to have any claim entered upon the proceedings, unless he relinquishes the action or suit.³ And in case the bankrupt is detained in prison at the suit of such creditor, the latter must then give a sufficient authority in writing for his discharge. The proving, or claiming, a debt under the fiat, is also deemed an election by the creditor, to take the benefit of the fiat with respect to the debt so proved, or claimed. And this is not limited to an election as between the creditor and the bankrupt only, but is applicable as to any question between the creditor so electing, and all the rest of the creditors.⁴ The creditor, however, is protected from any liability to pay the costs of the action or suit so relinquished, either to the bankrupt, or his assignees. Where the action is a *joint* one against the bankrupt and another person, the relinquishment of it against the bankrupt will not affect the action, as to such *other* person. If the fiat should be afterwards annulled, the creditor may then proceed in the action against the bankrupt, as if he had not elected,⁵—and if the action was a *bailable* one, may arrest the defendant *de novo*, if he has not put in or perfected bail, and if

¹ *Ex parte Dorvilliers*, 1 Atk. 221. *Ex parte Lindsey*, *Ibid.* 220. *Ex parte Capot*, *Ibid.* 219.

² *Ex parte Wilson*, 1 Atk. 152. *Ex parte Ward*, *Ibid.* 153. *Ex parte Crinsoz*, 1 Bro. 270; and see 1 Mont. Dig. 70. 2 Christ. B. L. 481. 8 T. R. 344. 3 Ves. 1. 1 V. & B. 315.

³ It was the practice, however, of the commissioners for some time before the 49 G. 3, c. 121, to insist upon this relinquishment on the part of the creditor. *Ex parte Bot-*

terill, 1 Atk. 109. 1 C. B. L. 130. *Ex parte Wilkinson*, 1 Atk. 83; and see *ex parte Woolley*, *infra*.

⁴ *Ex parte Bernasconi*, 2 G. & J. 387.

⁵ Before this provision in the statute, if the creditor had the bankrupt in execution, and had elected to come in under the commission, he could not retake him, if the commission was afterwards superseded.

bail has been put in or perfected, he may then proceed against the bail.

This section embraces, though it does not expressly provide for, two distinct cases of proof,—the one, where an action has been brought *before* the debt is proved,—and the other, where the *debt* is proved *previously* to the commencement of any action. With respect to the *first* case, viz., where the action is brought *before* the proof, the words of the statute are very general, and seem to amount to an absolute prohibition from proving *any* debt, without relinquishing the action pending, whether brought in respect of the debt offered to be proved, or of any other. As to the other case of proof, viz., where the action is brought *after* the proof of the debt, the enactment amounts only to a declaration of the legal effect of such proof or claim,—which is confined to the *debt so proved or claimed*.¹

Where action before proof.] Where a creditor, therefore, has two distinct demands against the bankrupt, for one of which he brings an action against him *before* the bankruptcy, and then proves the other under the fiat, the proof of this debt is an election to relinquish the action for the other, and to come in as a creditor for *both debts* under the fiat.² So, if a creditor sue two partners, the proof of his debt under a separate fiat against one is a relinquishment of the action.³ And where the creditor, instead of proving, presents merely a petition to be admitted to prove one of his demands, he is equally estopped from continuing his proceedings at law against the bankrupt for the other;⁴ for the presentation of such a petition is as much a pledge to prove, as entering a claim would be, and operates in itself as an election to come in under the fiat.⁵ So, where a creditor obtained an order for an inquiry before the commissioners, and before the order was drawn up took out execution upon a judgment then pending against the bankrupt, the lord chancellor ordered

¹ And see *Adams v. Bridge*, 8 Bing. 314.

² Ex parte *Dickson*, 1 Rose, 98. Before the 49 G. 3, c. 121, where a creditor had two demands against the bankrupt of a different nature, he might prove one under the commission, without relinquishing an action pending for the other; and his election to come in under the commission as to one debt, did not

compel him to make it as to both. Ex parte *Crinsoz*, 1 Bro. 270. Ex parte *Botteril*, 1 Atk. 109. Ex parte *Mathews*, 3 Atk. 817.

³ *Blannin v. Taylor*, 1 Gow. 199. ⁴ Ex parte *Hardenburgh*, 1 Rose, 204.

⁵ Ex parte *Blaydes*, 1 G. & J. 179. Ex parte *Irving*, Buck. 423. Ex parte *Lord*, 2 Rose, 421.

the goods to be restored, and put in the same situation as they were at the time of the order,—declaring, that a creditor obtaining an order at his own instance should not be suffered to take out execution, without first applying to set that order aside, or procuring the leave of the court.¹ So, if one creditor accepts an assignment from another of a debt proved, he is substantially a creditor proving himself under the fiat, and thereby relinquishes an action previously brought against the bankrupt for his own debt.²

Where a creditor of the bankrupt, previous to the commission, obtained a verdict against him for a nominal sum in an action for money had and received, subject to a reference,—and after the award was made (which was subsequent to the commission) entered up judgment for the debt and costs, and then proved the debt under the commission, and afterwards took the bankrupt in execution for the costs,—the lord chancellor ordered him to be discharged,—and that the creditor should pay the costs, unless he could produce an affidavit, that the commissioners had stated to him, that he had a right to seize the person of the bankrupt.³ It has been holden, however, that where a *separate* commission issued against one of a firm, and a *joint and separate* creditor had taken out execution against the bankrupt for his *joint* debt, he was still entitled to prove his *separate* debt, without giving up his execution.⁴ And where a creditor, *before* the bankruptcy, *seized* the effects of the bankrupt under an execution, though the goods were not sold till after the commission issued,—yet the creditor was allowed to retain his execution, and prove for the residue of his debt; for the above clause of the statute was held not to apply to a case of this nature.⁵ But if the validity of such execution is disputed, and the goods are not turned into money, he will not then be permitted to have a value set upon the goods, and to prove for the residue of his debt, in order to vote in the choice of assignees.⁶

As the proof or claim by the creditor operates, of itself, as a discontinuance of any action previously brought against the bankrupt, it is not necessary for the creditor to produce any rule of discontinuance in the action, in order to entitle him to prove; and, indeed that proceeding might be detri-

¹ *Ex parte Bozannet*, 1 Rose, 181.

² *Ex parte Taylor*, 1 G. & J. 399.

³ *Ex parte Haynes*, 1 G. & J. 107.

⁴ *Ex parte Stanborough*, 5 Mad.
89.

⁵ *Ex parte Hopley*, 1 G. & J. 63.
S.C. 2 Jac. & W. 220; and see
section 108.

⁶ *Ex parte Hopley*, 1 Jac. & W.
423.

mental to his rights against the bankrupt, as there is an uncertainty, whether his proof will be admitted or not.¹ And when the bankrupt is in actual custody at the suit of the creditor, the latter is entitled to the judgment of the commissioner upon his right to prove or claim, before he discharges the bankrupt; though the bankrupt must be actually discharged, and the action and all benefit from it relinquished, before the proof or claim is admitted on the proceedings.² As the statute provides, that the creditor in such a case must, before proving, given a written authority for the discharge of the bankrupt,—this saves the bankrupt the trouble and expense of applying to the superior court for his discharge. When the creditor has been permitted to prove, the bankrupt is entitled to have some entry or suggestion recording the election, put on the record in the court, where the action was brought.³ The proof the debt, however, does not operate so as to enable the bankrupt to *plead* it in bar to an action, but only gives him an opportunity of applying for relief to the superior court to stay proceedings in the action.⁴

When a creditor has proved under the fiat pending an action against the bankrupt, the *bail* will, of course, be discharged, as well as the bankrupt, from the consequences of the action, unless indeed the fiat is annulled, in which case the statute provides⁵ for the continuance of the liability of the bail. For, in order to proceed against the bail after judgment, it is necessary to take out a *capias ad satisfaciendum* against the principal, as *they* are only liable, in case the defendant cannot be taken upon that writ. And the *ca. sa.*, being process in the action, (which the creditor is obliged to relinquish upon proving his debt,) becomes after such proof, nothing but a mere piece of waste paper; and the bail are consequently not answerable for the appearance of their principal at the return of the writ, and are incapable of being fixed.⁶

Where action after proof.] Where a party, *after* the proof a debt, bring an action for the *same debt*, the court will issue an injunction to restrain the action.⁷

But where an action for one of two distinct debts is

¹ Ex parte *Woolley*, 1 Rose, 394.

² 1 V. & B. 253.

³ Ex parte *Fritth*, 1 G. & J. 165.

⁴ *Kemp v. Potter*, 6 Taunt. 549.

⁵ *Harley v. Greenwood*, 5 B. & A. 95.

⁶ 6 G. 4, c. 16, s. 59.

⁷ *Linging v. Comyn*, 2 Taunt. 246.

Aylett v. Harford, 2 Bl. 1317,

⁷ Ex parte *Diarch*, 2 Mont. & A.

675.

brought *after* the proof of the other, the creditor in this case is not deprived of his right of action; for the words of the statute do not make the proving or claiming a debt an election, with respect to separate and distinct debts,—but only “with respect to the debt so proved or claimed,” and also with respect to any action *then pending*. Thus, the holder of two bills of exchange may prove for the one, and *afterwards* sue the bankrupt on the other, notwithstanding the bills were given by the bankrupts for debts of the same nature, namely for goods sold by the creditor to the bankrupt.¹ The lord chancellor, however, under circumstances that justified his interference in such a case, ordered that the creditor should be restrained from suing the bankrupt on the other bill.²

But this was refused in a case by Sir J. Leach, though two bills were given for what was originally the same debt, where one of them (the bill sued upon) which the creditor had paid away before the bankruptcy, and which did not become due, it was not returned to him until after the bankruptcy, and after he had proved his debt upon the other bill.³

A creditor, however, will not be permitted to prove part of his debt, and afterwards to proceed at law for the whole debt; and in such a case, upon petition by the assignees, he will be restrained from issuing execution against the property of the bankrupt in their possession.⁴

So, where a creditor who sued a bankrupt for two different sums, one as the acceptor of a bill, and the other for goods sold and delivered,—after recovering judgment for the whole amount, proved under the fiat for the amount of the goods only, and afterwards issued a *ca. sa.* against the bankrupt for amount of the bill; it was held, that, as the judgment included both causes of action, and the creditor had proved under the fiat for that which formed a component part of the entire sum, he could not swear the judgment, and proceed to execution for the remainder.⁵

And where a creditor, after having proved a debt, brought an action against the bankrupt, and obtained judgment for the amount of the debt proved, a sum attempted to be proved, and other sums advanced after the bankruptcy, and caused the bankrupt's property in the possession of the

¹ *Watson v. Madax*, 1 B. & A. 121. *Harley v. Greenwood*, 5 B. & A. 95. *Ex parte Glover*, 1 G. & J. 270. *Howell v. Gollidge*, 5 Taunt. 174. *Bridget v. Mills*, 4 Bing. 18. *Ex parte Edwards*, Mont. & M. 116.

² *Ex parte Lobbon*, 17 Ves. 334.

³ *Ex parte Sly*, 2 G. & J. 163.

⁴ *Ex parte Bernascone*, 2 G. & J. 381.

⁵ *Geiked v. Hewson*, 4 Man. & G. 618.

assignees to be taken in execution, the court ordered the execution to be withdrawn altogether.¹

So, where a creditor proved under a *second fiat*,—though the bankrupt's estate under that commission did not pay 15s. in the pound, and he afterwards acquired future effects—he was held, nevertheless, to have made his election not to proceed against the bankrupt at law, in respect of such future effects.²

Rights of third persons.] But the above provision in the statute, as to the proof or a claim of a debt determining the creditor's election, only applies to the *creditor* so proving or claiming, or entitled to the benefit of any proof or claim, and will not affect the rights or the liability of a *third person*. Therefore, proof by the creditor will not prevent the *surety* from suing the bankrupt, unless, indeed, the surety is estopped³ by his own act, or by the bankrupt having obtained his certificate.⁴ Neither will it affect the claims of the *creditor against the surety* of the bankrupt; for the legislature considers the proof against the principal as a benefit to the surety.⁵ So, if the holder of a bill of exchange proves it under a fiat against the acceptor, and the drawer afterwards pays the amount to the holder, the proof of the holder under the fiat will not be considered an election binding upon the *drawer*, so as to preclude him from bringing an action on the bill against the acceptor.⁶

A creditor, also, is not prevented by proof of his debt, from suing any other person jointly liable with the bankrupt; therefore, proving a joint debt under a separate fiat against one partner, will not prevent the creditor from suing the other partners⁷ of the bankrupt. And where separate commissions were issued against three of four partners, and a joint creditor, under an order of the lord chancellor, proved his debt under one of the commissions, and afterwards sued all the partners for the same debt, and arrested one of the other two, under whose commissions he had not proved,—it was held, that there was no objection to this proceeding, as the proof against the estate of *one* was not an election as to the estate of the *others*.⁸ And in every case of this kind, if the rules of pleading require it, the creditor may make

¹ Ex parte *Chambers*, Mont. & M. 130.

² *Read v. Sowerby*, 3 M. & S. 78.

³ *Townend v. Downing*, 14 East, 565. Ex parte *Lobbon*, 17 Ves. 334; and see post, "Sureties."

⁴ *Vansandau v. Crosbie*, 8 Taunt. 550. 2 Moore, 602.

⁵ Ex parte *Hughes*, 5 B. & A. 484.

⁶ *Mead v. Braham*, 3 M. & S. 91.

⁷ *Heath v. Hall*, 4 Taunt. 326.

⁸ *Young v. Glass*, 16 East, 252.

the bankrupt a co-defendant, upon indemnifying him against the consequences of his being made a party to the action.¹ But though the lord chancellor will order such an indemnity to be given, or else that the bankrupt's name shall be struck out of the action,—yet a court of law will not grant the bankrupt this relief, but leave him to plead his bankruptcy.²

What a conclusive election.] A petitioning creditor, it has been already observed, is always considered to have made his election not to sue bankrupt at law;³ and though the fiat be not opened, yet, if it is capable of prosecution, he is equally bound.⁴ He need not, however, relinquish his action before he *petitions* for the fiat, the statute only applying to *proof, or claim*;⁵ but he must do so, of course, before he proves at the opening of the fiat.⁶

The being *chosen* an assignee merely of the estate of a bankrupt, will not prevent a creditor from suing the bankrupt at law, provided he has *not proved* his debt.⁷

Where a creditor, *after* a fiat is sued out, takes the *body* of the bankrupt in execution, it is a *conclusive* election; and he will not be entitled to prove, so as to receive a dividend, although he should afterwards discharge the bankrupt out of custody. For the taking the body of a defendant in execution is considered, in law, a satisfaction of the debt;⁸ and though he discharges his person afterwards, he cannot resort to the debtor's effects.⁹ And even in the case of an *agent*, who, without the authority or knowledge of his principal, who was abroad, took the bankrupt in execution *after* the issuing of the commission, this was held to be an¹⁰ election by the principal. But the taking a bankrupt in execution will not deprive the creditor of his right to prove, for the purpose of dissenting from the certificate; for if the bankrupt obtain his certificate, he will then be discharged at once from the execution.¹¹ But where a writ of *ca. sa.* is lodged with the sheriff for the purpose merely of fixing the bail, and the bankrupt surrenders in discharge of his

¹ *Ex parte Read*, 1 Rose, 460.
¹ V. & B. 346.

² 1 Rose, 461, note (a).

³ *Ante*, 183.

⁴ *Ex parte Prowse*, 1 G. & J. 92.

⁵ *Bryant v. Withers*, 2 Rose, 8.

⁶ 2 Christ. B. L. 485.

⁷ *Ex parte Ward*, 1 Atk. 152.

⁸ *Ex parte Hicklin*, C. B. L. 131.

Ex parte Warder, *ibid.* 132. *Ex parte Caton*. *Ex parte Rattray*, *ibid.*

Ex parte Knowell, 13 Ves. 192.

⁹ *Ex parte Billon*, C. B. L. 133.

Ex parte Hewitt, *ibid.*

¹⁰ C. B. L. 132.

¹¹ *Ex parte Chadwick*, C. B. L.

133. *Ex parte Hopkinson*, 1 Ves.

159.

bail, but is never actually charged in execution by the creditor,—in this case, the creditor's election is not determined. For the surrender of a defendant in discharge of his bail is his own voluntary act, and does not amount to charging him in execution by the creditor: but, if he be not discharged by the creditor before the expiration of two terms, then the case will be¹ different. And the mere issuing of a *ca. sa.*, if the defendant be not taken under it, is not enough to determine the creditor's election.² So, if the creditor has taken the bankrupt in execution *before* the issuing of the fiat, the creditor, in that case, is not concluded, but has his election, either to continue him in execution, or to come in under the fiat;³ for there can be no election as to proof, where there is no fiat. But if he continues him in execution, he cannot prove under the fiat.⁴ But when a creditor has taken his debtor in execution, he cannot be a petitioning creditor.⁵ An attachment of the bankrupt after the fiat is issued, for nonpayment of money *into court*, under an order in a suit instituted against him *before* the fiat issued, is not considered a proceeding against his person in satisfaction of the debt,—and, therefore, not such an election, as will prevent the creditor from proving. What might have been the effect of attaching the defendant, if the order had been to pay the money *to the party himself*, Lord Eldon would not determine.⁶

A *landlord*, formerly, when he distrained and proved also for the amount of his rent, was put to his election to waive his proof, or his distress.⁷ But now, it should seem, when he has once proved the amount under a fiat, he cannot, consistently with the provision of the statute, distrain for it afterwards;—for the statute says, that the proof by *any* creditor shall be deemed an election, with respect to the debt so proved.

As to the election of a *joint creditor* suing out a *separate fiat* to prove against the *joint*, or *separate*, estate,—see post, title “Partners.”

¹ Ex parte *Cundall*, 6 Ves. 446.
Ex parte *Arundel*, 1 Rose, 143.
18 Ves. 231.

² Ibid.

³ Ex parte *Hicklin*, supra. Ex parte *Du Paz*, C. B. L. 134. Ex

parte *Goodman*, 3 Dea. 631. And see post, “Judgment Creditors.”

⁴ Ex parte *Mudie*, 3 M. D. & D. 66.

⁵ *Burnaby's case*, 1 Str. 653.

⁶ Ex parte *Benjamin*, Buck. 41.

⁷ Ex parte *Grove*, 1 Atk. 105.

SECTION III.

Time of Proof.

A creditor may prove his debt at either of the two public meetings of the commissioners, which are appointed by them when they declare the party bankrupt, as well as at any other public meeting to declare a dividend, or for other purposes, or at any meeting specially appointed by them for the proof of debts, of which ten days' previous notice has been given in the *London Gazette*. This last is also considered a public, and not a private meeting; and any creditor may have one called for the proof of his particular debt, upon paying the expenses of the meeting.

In the early administration of the bankrupt law, it was considered, that after any dividend declared of the bankrupt's effects, a creditor could not be admitted to prove his debt, unless under particular circumstances.¹ But such a restriction has long ceased; and now any creditor, before a final dividend is declared, (unless there have been gross laches on his part), is entitled to prove his debt, so as not to disturb any former dividend.² But he has a right to be brought up equal to the creditors under the former dividend, before the commissioner can proceed to make a fresh one.³ Where a creditor, however, laid by for fifteen years after the date of the commission, when both the bankrupt and the assignees were dead, Lord Hardwicke would not allow him, under these circumstances, to be admitted a creditor.⁴

But assignees under one fiat applying to prove under another are not bound by the same laches as might bind an individual creditor.⁵

It is no objection to the proof of a debt under a third fiat, that the creditor might have proved it under the second fiat, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 1*5s.* in the pound under the second fiat.⁶

¹ Hob. 287. Hutt. 38. Good. 43.

² Ex parte *M'Cheave*, 1 M. D. & D. 329.

³ Ex parte *Stiles*, 1 Atk. 209.

⁴ Ex parte *Peachy*, 1 Atk. 111.

⁵ Ex parte *Smith*, 1 D. & C. 267.

⁶ Ex parte *Moseley*, 2 D. & C. 45.

SECTION IV.

Manner of Proof.

The usual mode of proof¹ is for the creditor to attend in person before the commissioner, and make oath (or if he is a quaker² affirmation) of the truth and justice of his debt. The commissioner has a discretionary power, in requiring or dispensing with the personal attendance of the creditor; and the court of review will not interfere on the subject.³ The deposition of the creditor, if not objected to by the bankrupt himself, or any of the creditors, within a reasonable time, is conclusive;⁴ but if any well founded objection is raised, the demand must be substantiated by further evidence. For notwithstanding the creditor makes a positive oath of the debt, if the commissioner has any just grounds to doubt its fairness, he ought to admit it only as a claim; or, indeed, it may be rejected entirely, if it is not made out in any way to his satisfaction.⁵ For the jurisdiction of the commissioner in this respect, like that of the court of review, is both legal and equitable. Thus he not only may, but is bound to inquire into the consideration of a debt, notwithstanding a verdict; for if there are equitable grounds to impeach the verdict, he may reject⁶ the proof; and even though there be a judgment, it seems that the commissioner may also inquire into the⁷ consideration; and the same in the case of proof being tendered on an award.⁸ The proper form of the creditor's deposition is, that the debt was due and owing before, and at the date and suing forth of the fiat.⁹ A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first; the only question is, which is that most worthy of credit.¹⁰

If any creditor lives remote¹¹ from the place where the commissioner's court is held, he may then prove his debt, by making an affidavit of it before a master in chancery; or, in case he lives out of England, then by affidavit sworn

¹ And see 6 G. 4, c. 16, s. 46.

² Section 99.

³ Ex parte *Shaw*, 4 Dea. 190.

⁴ *Bromley v. Goodere*, 1 Atk. 77.

⁵ Ex parte *Simpson*, 1 Atk. 70.

Ex parte *Wood*, *ibid.* 221.

⁶ Ex parte *Rashleigh*. Ex parte *Butterfield*, 1 Rose, 192.

⁷ Ex parte *Bryant*, 1 V. & B. 214; and see post, p. 197.

⁸ Ex parte *Hemstead*, 1 Rose, 149.

⁹ *Bamford v. Burrell*, 2 Bos. 1.

¹⁰ Ex parte *Britton*, 3 D. & C. 35.

¹¹ 6 G. 4, c. 16, s. 46, and 1 & 2 W. 4, c. 56, s. 34.

before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul. Where an affidavit of a foreign creditor was sworn before a British vice-consul, and merely certified under the consular seal, it was held to be inadmissible, for want of being attested by a notary.¹ If a defective affidavit is produced, the commissioner should not absolutely reject, but only adjourn the proof.² Where a creditor died, after making the affidavit, and *before* it was *exhibited* to the commissioners, the admission of the affidavit in proof was considered irregular, and the commissioners were directed to review the proof, although no dividend had been paid³ upon it.

Where a creditor was, by age and imbecility of mind, incompetent to prove, and resided with a person who had for many years had the management of his affairs, the commissioners were directed to admit the proof upon such evidence as should be satisfactory to them; although the amount of the debt was 3,000*l*.⁴

So, where a *creditor* became *deranged* in his mind, and a friend, at the request of the creditor's family, had undertaken the superintendence and management of his business, such person was permitted to prove the debt due to the creditor, and to vote in the choice of assignees, without a commission of lunacy being issued—upon an affidavit of the facts, and a certificate of a physician that the creditor was deranged.⁵

A *corporation*, or any *public company* incorporated by charter or Act of Parliament, may prove by an agent, provided the agent make oath that he is such agent, and authorised to make the proof.⁶ And where a great number of societies and institutions, some not incorporated, had deposited funds with the bankrupts, and a considerable expense would have been occasioned to the estate if each society had presented a petition that an agent might prove for them, it was ordered, on one petition presented by the assignees, that the respective agents of the several societies

¹ Ex parte *Moens*, Mont. 15.

² Ex parte *Maberley*, 2 M. & A. 23.

³ Ex parte *Bridges*, 4 Mad. 269.

⁴ Ex parte *Clarke*, 2 Russ. 575.

⁵ Ex parte *Maltby*, 1 Rose, 387.

⁶ Section 46. It was formerly necessary to exhibit the appointment of the agent under the common seal of the corporation; (Green, 117;) and in the case of the Bank

of England, a clerk was obliged to produce a power of attorney to enable him to prove a debt due to the Bank. Ex parte *Bank of England*, 18 Ves. 228. 1 Rose, 142. 1 Wils. 295. And now also a power of attorney is necessary to enable the agent to vote in the choice of assignees. Vide section 61. 1 Wils. 295. 1 Swanst. 10. .

might tender proof of their respective debts, but not to have any power over the certificate or the choice of assignees.¹ So, under a fiat against a banker, one person was allowed to prove on behalf of a large number of holders of 1*l.* notes, not interfering as to the choice of assignees, or the certificate.² But a proof cannot, in general, be made by one person on behalf of several creditors entitled to prove, unless from necessity, or by consent.³ And any person applying to prove for any other creditor must produce his authority, and have it exhibited.⁴

Where a *trustee* proves a debt against the bankrupt, the *cestui que trust* ought to join with him in the deposition, and the trust deed should be exhibited to the commissioner.⁵ But one of several trustees cannot prove, without an order of the court for that purpose; though the practice is different in the case of executors, one of whom may prove on behalf of himself and his co-executors.⁶

Where the bankrupt is an *executor* or *trustee*, and applies to prove against his own estate, the commissioner should not receive the proof without a special order of the court of review, to which is always annexed a condition, that the dividends received under such proof are not to come into the hands of the bankrupt.⁷

Where the *assignee of a bond* applies to prove, the assignor must join in the proof, and the bond and assignment must also be exhibited.⁸ In like manner, the proof by an assignee of another bankrupt must be supported by the affidavit of the bankrupt.⁹

If a *navy agent* be bankrupt, one of the admirals may prove in behalf of himself and of the crew.¹⁰

In the case of an *infant creditor*, he will be permitted, on petition, to prove by his¹¹ guardian.

Every *security* that a creditor has for his debt must be produced at the time of his proving, when the commissioner marks them as having been exhibited; and if he has a *judgment*, an office copy of it must be exhibited.¹²

¹ Ex parte *Ellis*, 1 D. & C. 463.

² Ex parte *Gordon*, 1 M. & A. 282.

³ Ex parte *Bank of England*, 2 G. & J. 363.

⁴ C. B. L. 130.

⁵ Green, 149. *Beardmore v. Cruttenden*, C. B. L. 211. Ex parte *Dubois*, 1 Cox, 310.

⁶ Ex parte *Smith*, Re *Manning*, 1 Dea. 385.

⁷ Ex parte *Shaw*, 1 G. & J. 161, and see post, p. 222. Section 10.

⁸ 1 Mont. Dig. 145.

⁹ Ex parte *Robson*, 2 M. D. & D. 65.

¹⁰ Ex parte *Russel*, 4 Mont. B. L. 78.

¹¹ Ex parte *Belton*, 1 Atk. 251.

¹² C. B. L. 129. Ex parte *Williamson*, 1 Atk. 83.

If the commissioner improperly admit, or reject, a proof, the proper course is, to petition the court of review to have the proof admitted, or expunged.¹

SECTION V.

Of Judgment Creditors.

A judgment creditor is not entitled to receive more than a rateable part of his debt,² except in respect of an execution, or extent, served and levied by *seizure* upon the property of the bankrupt before³ the bankruptcy. And no creditor, though for a valuable consideration, who even sues out execution upon any judgment obtained by *default*, *confession*, or *nil dicit*, can avail himself of such execution to the prejudice of other fair creditors, but must be paid rateably with such creditors, unless (by 1 Will. 4, c. 7, s. 7,) the judgment be on a *cognovit* signed after a declaration filed or delivered, or by default, confession, or *nil dicit*, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference.

But by 3 Geo. 4, c. 39, all warrants of attorney and *cognovits* must be filed in the manner directed by that act, within twenty-one days after the execution of them,—otherwise they are declared to be, as well as the judgment to be entered on them, void and fraudulent, as against the assignees under any commission of bankruptcy issued against the person giving such warrant of attorney or *cognovit*.

An order of the court of Chancery for the payment of money may be proved under a fiat, and as a debt proveable, will be barred by the certificate.⁴

But where a plaintiff obtained a decree, referring it to the master to take an account of what was due to him, and that what should be so found due should be paid to him, with

¹ *Clarke v. Capron*, 2 Ves. 666. C. B. L. 130. And see ante, p. 182.

² 6 Geo. 4, c. 16, s. 108.

³ And see *Newland v. —*, 1 P. Wms. 92. *Oriebar v. Fletcher*, ibid. 737. *Sharpe v. Roahde*, 2 Rose, 192. In the 2nd vol. of Schoales & Lefroy's Reports, 425, there is a dictum of Lord Redesdale, that if judgment was entered up before the bankrupt was a trader, it binds the lands, notwithstanding subsequent

trading and bankruptcy, although execution is not issued. But this observation of that learned judge was intended to apply only to the Irish Bankrupt Act (the 11 & 12 G. 3, c. 8, s. 5.), and was not meant to extend to the bankrupt law of England.

⁴ *Ex parte Parker*, 3 Ves. 554. *Wall v. Atkinson*, 2 Rose, 196. In the matter of *M'Williams*, 1 Scho. & Lef. 174.

costs, to be taxed by the master, and the master did not make his report until after a fiat had issued against the defendant; it was held that, as the decree was not final, the plaintiff was not entitled to prove for the amount of the debt and costs found due by the master's report.¹

So, where an interlocutory order was obtained in a suit in Chancery for the payment of a certain sum into court by the defendant, who afterwards became bankrupt,—the court declined making an order for the plaintiff to prove for the specific sum mentioned in the order of the court of Chancery, but gave him leave to prove for such sum as might be due to him.²

Money due upon a judgment for mesne profits, or a judgment in an action for damages on a tort—where the verdict is *after*³ the bankruptcy of the defendant—or where the verdict is even before, but the judgment is not signed till *after* the issuing of the fiat⁴—is not in either of such cases proveable. A verdict, indeed, is only *prima facie* evidence of a debt, which the creditors of the bankrupt are at liberty to⁵ impeach, and into the circumstances of which, if impeached, the commissioner, as we have before seen,⁶ is bound to inquire. Where the plaintiff, however, in an action of trespass (having obtained a verdict) signed final judgment *before* the commission issued, though after the act of bankruptcy, the court of King's Bench decided that the judgment was proveable, as being a debt *bona fide* contracted between the act of bankruptcy and the issuing of the commission, within the meaning of the 46 Geo. 3, c. 135, s. 2,—and, consequently, within the meaning, also, of the *forty-seventh* section of the 6 Geo. 4, c. 16, which adopts that clause of the former act.⁷ And, though a judgment in assumpsit was not actually signed till several days *after* the commission issued, it was held, nevertheless, to relate back to the first day of the term in which it was signed,—and, this being *before* the issuing of the commission, the judgment was held to be proveable.⁸ And a judgment in an action of *trover*, it has been held cannot, in this respect, be distinguished from a judgment in an action of assumpsit.⁹

¹ Ex parte *Crosse*, 2 M. D. & D. 308.

² Ex parte *Louden*, 1 M. D. & D. 583.

³ *Moggridge v. Davis*, Wightw. Rep. 16.

⁴ *Buss v. Gilbert*, 2 M. & S. 70; and see post, "Costs."

⁵ Ex parte *Rashleigh*, 1 Rose, 192.

⁶ Ante, 193.

⁷ *Robinson v. Vale*, 2 B. & C. 762.

⁸ Ex parte *Birch*, 4 B. & C. 880. 6 D. & R. 436.

⁹ *Greenway v. Fisher*, 7. B. & C. 436.

A judgment creditor, who, having taken the body of a bankrupt in execution before the bankruptcy, kept him in prison till he was discharged by his certificate, was held to have no right of proof under the bankruptcy.¹ But, where a creditor had, before the bankruptcy of his debtor, taken him in execution, died shortly before the issuing of the fiat, and the bankrupt obtained a judge's order for his discharge, on the ground that the action abated by the death of the plaintiff, the plaintiff's execution in no way interfering to oppose the discharge; it was held that the discharge was not an extinguishment of the debt, and that the execution could prove the amount of it under the fiat.²

The commissioner may, it seems, inquire into the consideration for a judgment debt.³ And where the judgment was obtained under such circumstances as would have been a ground for the interference of a court of equity, to restrain execution,—those circumstances were held a sufficient objection to the proof, although the debtor omitted to make a legal defence which he had to the action, and although nearly twenty years had elapsed since the judgment was obtained.⁴

Where a creditor is entitled to prove in respect of any judgment, decree, or order, he may now also prove for the costs, though the costs were not taxed at the time of the bankruptcy,⁵ exhibiting an office copy of such judgment decree, or order.

SECTION VI.

Of Creditors having a Mortgage, or equitable Lien.

When a creditor has a mortgage from the bankrupt, or any property pledged by him upon condition or power of redemption at a future day, the assignees may, by the *seventieth* section of the 6 Geo. 4, c. 16, before the time limited for the performance of the condition, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done; and may afterwards sell and dispose of the mortgaged premises for the benefit of the creditors.

But if the mortgage is forfeited, and the creditor appre-

¹ *Ex parte Mudie*, 3 M. D. & D. 66. *Ex parte Prescott*, 1 M. D. & D. 199.

² *Ex parte Goodman*, 3 Dea. 631.

³ *Ex parte Bryant*, 1 Ves. & B. 214. *Ex parte Marson*, 3 Dea. 79. ⁴ *Ex parte Mudie*, 2 M. D. & D. 66.

⁵ Section 58; and see post, section 19, "Costs."

hends it is not equal to the payment of his debt, he must then apply to the commissioner to have the mortgage sold, and be admitted to prove for the residue.¹ Or he may, if he chooses, file a bill against the assignees for a foreclosure.² But if a creditor proves the whole amount of his debt, exhibiting a mortgage for a part, and receives a dividend upon his proof, it has been held that he forfeits his mortgage.³

Sale of Mortgage.] In order to have the mortgage sold, a special application to the lord chancellor was formerly necessary,⁴ but this may be done now under the general order,⁵ by which the commissioners are directed to have the mortgage sold, either before them, or by public auction, previously causing due notice to be given in the *London Gazette*, and in such other of the public papers as they shall think fit, of the time and place of sale. But a petition to the court of review seems still to be the proper course, where from any union of interests in the same persons it is desirable that the sale should take place under the immediate direction of the court, in order to avoid all imputation, as where the assignees were also the executors of the mortgagee.⁶ The proceeds of the sale⁷ are to be applied—first, in payment of the expenses attending the sale, and then in payment of what is due to the mortgagee for principal, interest, and costs; and in case the proceeds are not sufficient for that purpose, the mortgagee may be admitted a creditor for the deficiency. But he can only prove for interest up to the date of the fiat.⁸ A legal mortgagee of an equitable estate is within the general order.⁹

The assignees have always the conduct of the sale of the mortgaged property;¹⁰ but where an assignee is also the mortgagee, a solicitor will be appointed to take the account, and conduct the sale.¹¹ Where the assignees being in the

¹ The same rule has been adopted in a suit in equity for the administration of assets. *Greenwood v. Taylor*, 1 Russ & M. 185.

² *Bainbridge v. Pinhorn*, Buck. 135.

³ *Ex parte Eggington*, Mont. 72. But see *ex parte Sherington* 1 M.D. & D. 195.

⁴ *Ex parte Howell*, 7 Vin. 101. *Ex parte Coming*, 9 Ves. 115. *Ex parte Wetherell*, 11 Ves. 398. *Ex parte Haigh*, *ibid.* 403. *Ex parte Twogood*, 19 Ves. 231.

⁵ Lord Loborough, 8th March, 1794.

⁶ *Ex parte Cowdry*, 2 G. & J. 272.

⁷ As to the rules for conducting the sale of the bankrupt's property, whether under the general, or a special order, see post, "Assignees."

⁸ *Ex parte Wardell*, C. B. L. 195. *Ex parte Harvey*, *ibid.* *Ex parte Badger*, 4 Ves. 165.

⁹ *Ex parte Aple*, 1 M. & A. 621.

¹⁰ *Ex parte Barnett*, 3 M. D. & D. 662.

¹¹ *Ex parte Lees*, 2 D. & C. 360.

premises at the sale, and get an order for a second sale, when they produce less, it seems that they are liable to the mortgagee for the difference in the amount; but if the mortgagee himself should apply for a second sale, he then waives any claim against the assignees for the difference; though he is entitled to be indemnified from the ground-rent, and all expenses incurred since the first sale.¹ A distress for rent must be satisfied by the mortgagee out of the proceeds of the sale.²

The commissioner has jurisdiction, under the general order, to take an account of the expenses attending the sale of the mortgaged premises, and to tax the costs of all parties.³ And where it is merely a question of convenience, it will be left to the assignees to choose whether the mortgage accounts shall be taken before the commissioner, or the master.⁴ The commissioner has also authority, under the 6 Geo. 4, c. 16, ss. 33 and 34, to compel a mortgagee to produce his mortgage deed, and to commit him for refusing to produce it.⁵

Where the bankrupt executed a mortgage with a power of sale, subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid; it was held that the mortgagee might, on petition, have the common order for sale, with liberty to prove for the residue.⁶ But where a security was by way of conveyance to a trustee on trust to sell, and pay out of the proceeds the sum secured, it was doubted whether this was a legal mortgage within the general order.⁷

All *personal securities*, which are merely pledged or deposited by the bankrupt with the creditor, may (we have seen⁸) as well as mortgages, be directed by a special order to be sold before the commissioners;⁹ but in this case the assignees are alone entitled to insist upon the sale.¹⁰

Where there is a *second* mortgagee, who does not claim under the fiat, but rests upon his security, he cannot be compelled to join in the sale obtained by a prior mortgagee.¹¹ But where a second mortgagee elects to abandon his security and come in under the fiat, under the impression that the first mortgagee will not receive sufficient by the sale of the

¹ Ex parte Baldock, 2 D. & C. 60.

Ex parte Hodson, 1 G. & J. 12.

² Ex parte Cocks, 3 D. & C. 8.

Ex parte Barnett, 3 M. D. & D. 662.

³ Ex parte Mather, 1 G. & J. 342.⁸ Ante, 179.⁴ Ex parte Ansley, Buck. 292.⁹ Ex parte Hillier, C. B. L. 123.⁵ Ex parte Culdecott, Mont. 55.¹⁰ Ex parte Troughton, C. B. L.⁶ Ex parte Bignold, 3 Dea. 151.

124. Ex parte Gardner, ibid.

Ex parte Bacon, 2 D. & C. 184.

¹¹ Ex parte Jackson, 5 Ves. 357.⁷ Ex parte Davis, 3 D. & C. 504.

Ex parte Topham, 1 Mad. 38.

estate to pay off his mortgage, but upon a sale there turns out to be a surplus,—the second mortgagee in this case will not be allowed to withdraw his proof, and be remitted to his mortgage.¹ When the second mortgagee will not consent to join in a sale, the better plan seems to be for the assignees to request the commissioner to call before them both mortgagees, and examine them as to the amount of the principal and interest due on their respective mortgages. The assignees may then advertise the estate for sale, subject to the two mortgages; and if more is bid for it than what is due on both, the assignees, or the purchaser, can in that case redeem them. If there is no advance, both mortgagees will then be left to their usual remedy, and the assignees will have no further interest in the premises.²

Where there are several mortgages to the same mortgagee for distinct debts, the proceeds of the sale of each estate must be applied solely to the particular debt charged in that estate, and the surplus of the funds of one estate must be applied to make good the deficiency of another estate.³

Where a bankrupt, to whom estates are mortgaged to secure the balance due from time to time on an account current, mortgages his interest under this mortgage, the sub-mortgagee cannot have an order for sale of the original mortgage debt, without a preliminary inquiry as to its amount;⁴ but he may, pending that inquiry, enter a claim for the full amount. In such a case, it is not necessary to give notice of the sub-mortgage to the original mortgagor, to take the mortgage debt out of the order and disposition of the original mortgagee.⁴

A mortgagee has a right to have the estate sold in the same plight as it was in at the time of the bankruptcy. Therefore, where the bankrupt (before assignees were chosen) was proceeding to cut underwood which he had mortgaged, the lord chancellor, upon the application of the mortgagee, granted an injunction to restrain him from so doing.⁵

The court will not postpone the sale of the mortgaged property on the application of the assignees, if the mortgagee objects to such postponement.⁶

Bidding at Sale.] The assignees are not entitled to a reserved bidding upon the sale of the mortgaged property,

¹ Ex parte *Doune*s, 1 Rose, 96.
18 Ves. 290.

² 2 Christ. B. L. 323.

³ Ex parte *Bignold*, 2 Dea. 66.

⁴ Ex parte *Mackay*, 1 M. D. & D. 551.

⁵ *Hampton v. Hodges*, 8 Ves. 105.

⁶ Ex parte *Belcher*, 2 Dea. & C. 587.

unless they undertake to pay the mortgagee his principal, interest, and costs;¹ and it seems that the court will not give the assignees themselves leave to fix a reserved bidding, but only such as the commissioner may approve of.²

Where a mortgagee wishes to bid at the sale as a purchaser of the property mortgaged, it is usual for him to apply by petition for leave to do so,³ undertaking to make good the deficiency between the sum bid and the price to be fixed by the master, in case the latter should not approve of the bidding.⁴ But though it is the practice for the mortgagee to apply to the court, it has been doubted whether such an application is absolutely necessary; as it is always competent to him to purchase from the mortgagor the equity of redemption, and the bankruptcy does not seem to make any difference.⁵ It is, however, the usual and the prudent course to apply for such leave.⁶ If, indeed, the mortgagee has a power of sale given him by the mortgage, he is then considered in the light of a trustee, who is in general disabled from purchasing for himself;⁷ but, in bankruptcy, he may waive his special power of sale, and apply for one in his general character of mortgagee,—when liberty will be given to him to bid, the sale being before the commissioner, and conducted by the⁸ assignees. On every application for leave to bid, the mortgagee must pay the costs of the order;⁹ and they will not be allowed out of the proceeds of the sale, unless the assignees consent.¹⁰ But where the assignees appear and consent, the costs may then be paid out of the estate.¹¹ Where the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed to conduct the sale;¹² and the same where a mortgagee is also an assignee:¹³ and although a mortgagee may waive his privilege to bid, the assignees must have the conduct of the sale.¹⁴ If a mortgagee has

¹ *Ex parte Ellis*, 3 D. & C. 297. *Ex parte Thomas*, *Id.* 292. *Ex parte Bernard*, 3 Dea. & C. 291.

² *Ex parte Lackington*, 3 M. D. & D. 331.

³ *Ex parte Duane*, Buck. 18. *Ex parte March*, 1 Mad. 148.

⁴ *Re Salisbury*, Buck. 349.

⁵ *Ex parte Hammond*, Buck. 467; and see Sugden, Law V. & P. 572.

⁶ *Ex parte Ashley*, 3 Dea. & C. 510.

⁷ *Doune v. Grayebrooke*, 3 Mer. 206.

⁸ *Ex parte Hodgson*, 1 G. & J. 12. *Ex parte Davis*, 3 D. & C. 504.

⁹ *Ex parte Robinson*, Mont. & M. 261. *Ex parte Williams*, 4 D. & C. 489. *Ex parte Evans*, 2 Dea. 531.

¹⁰ *Anon*, 3 M. D. & D. 839.

¹¹ *Ex parte Say*, Mont. 364, 1 Dea. & C. 32. *Ex parte Williams*, 1 D. & C. 489.

¹² *Ex parte Rolfe*, 1 D. & C. 77, Mont. 515.

¹³ *Ex parte Greenwood*, 1 Dea. & C. 542. *Ex parte Lees*, 2 D. & C. 360.

¹⁴ *Ex parte Smith*, 2 Dea. & C. 60.

inadvertently bid at the sale and become the purchaser, without having previously obtained an order, the court will grant him an order *nunc pro tunc*.¹ The court will not exempt the mortgagee from paying the deposit money, if he should become the purchaser.² When a mortgagee becomes the purchaser of the premises mortgaged, he is liable for the expenses of the sale, if it does not produce a sum equal to pay those expenses, as well as the amount of his mortgage.³

Sales by auction of any real or personal estate of the bankrupt are, by the 6 Geo. 4, c. 16, s. 68, declared to be free from any auction duty. But it seems, that property which the bankrupt has mortgaged is (after the mortgage is forfeited) not within this exception, as not being, in law, any longer the property of the bankrupt.⁴ Where, however, the sale was by the order of the commissioner, without consulting the mortgagee, in that case it has been held that the duty is not payable.⁵

Equitable mortgages.] The general order, however, as to the sale of property mortgaged, applies only to *legal* mortgages, and not to *equitable* ones; in the latter case, therefore, a special order of the court of review must be obtained before a sale can be had; though there is no necessity for an order if all parties agree to the sale without one.⁶ The validity of an equitable mortgage is denied by the court, without reference to the commissioner, but when the mort-

¹ *Ex parte Pedder*, 3 Dea. & C. 622. *Ex parte Yorke*, 3 M. D. & D. 329.

² *Ex parte Tatham*, 4 Dea. & C. 360. *Ex parte Wilson*, 3 Dea. 505.

³ *Bowles v. Perring*, 2 B. & B. 457. 5 Moore, 296.

⁴ *Coare v. Creed*, 2 Esp. 699. *Rex v. Abbott*, 3 Pri. 178. Sir E. Sugden in his *Law of Vendors and Purchasers* (page 12), thought that the decision in *Coare v. Creed* could not be supported; but it has been since considerably strengthened by the subsequent case of *Rex v. Abbott*, in which all the learned author's ingenious arguments against the liability to the duty, were urged without effect in the court of Exchequer. Lord Henley, too, in his *Treatise on the Bankrupt Law*, (page 100,) conceived that, as the 6 G. 4, c. 16, declared in general terms,

that all sales of the real or personal property of the bankrupt should be exempted from the duty, without confining the exemption (as in the 19 G. 3, c. 56, s. 15,) to "sales by the order of the assignees," the mortgaged property sold under the bankruptcy would not be liable to the duty. But both the above cases were decided on the principle, (independently of the point made in *Coare v. Creed*, that a sale of mortgaged property under the general order was not a "sale by the order of the assignees,") that the sale, except as to the equity of redemption, was *not* a sale of the estate of the bankrupt, but a sale of the estate of the mortgagee.

⁵ *Attorney-General v. Winstanley*, 2 Dow & Clark, Parl. Ca. 302. 5 Bl. N. S. 130.

⁶ *Ex parte Whitbread*, 3 Dea. 311.

gage is established, a reference is then made to him to take an account of what is due on it; or, in doubtful cases, the court will direct an issue.¹ An *equitable mortgage* is created by the deposit of title deeds, with an agreement, either written or parol, that they are deposited as a security for the debt; and the mere possession of the deeds, if no other purpose of deposit is shown, affords a presumption that the estate was intended to be a security.² And a written agreement to deposit a lease when granted, and which is subsequently granted, creates an equitable mortgage.³ But a mere verbal notice to the intended lessor to place the lease, when executed, in the hands of a creditor, is not sufficient.⁴ So, a trustee, having a partial interest in the trust property, may incumber his interest by a deposit of the title deeds.⁵ But where the petition alleged, that the deposit was made by a party "acting as the solicitor of the bankrupt," this was held not a sufficient allegation of any actual authority given by the bankrupt to make the deposit.⁶ An agreement in writing to grant a legal mortgage, without any deposit, is sufficient to apply for the usual order of sale.⁷

And where the bankrupt, being the lessee under a lease for forty-six years, subject to a former lease for twenty years, deposited it by way of equitable mortgage, and afterwards purchased the remainder of the time granted by the first lease, which he deposited also with the same party for securing a further sum; it was held that the first lease did not become merged in the second, and that the depositaries were good equitable mortgagees under both deposits.⁸

A solicitor cannot receive a deposit of title deeds, by way of equitable mortgage, to secure the payment of *future bills of costs*.⁹

An equitable mortgagee of a bankrupt tenant-in-tail is entitled to have his lien made good as against the fee-simple and inheritance of the premises, under the 6 Geo. 4, c. 16, s. 65.¹⁰

It is quite in the discretion of the court to make an order for the sale of an equitable mortgage; and the court will make no such order where there is any doubt as to the

¹ *Ex parte Jennings*, 1 Mad. 331.
² Swanst. 360.

³ *Russel v. Russel*, 1 Bro. 269.
Peatherstone v. Fenwick, *Harford v. Carpenter*, *ibid.* note. *Ex parte Bruce*, 1 Rose, 374; but see *Lucas v. Dorrien*, post, 204.

⁴ *Ex parte Orrett*, 3 M. & A. 151.

⁵ *Ex parte Perry*, 3 M. D. & D. 252.

⁶ *Ex parte Smith*, 2 M. D. & D. 587.

⁷ *Ex parte Coleman*, 4 Dea. 242.

⁸ *Ex parte Jones*, 4 D. & C. 750.

⁹ *Ex parte Whitbread*, 2 M. D. & D. 415.

¹⁰ *Ex parte Laing*, 2 M. & A. 381.

¹¹ *Ex parte Wise*, Mont. & M. 65.

validity of the transaction.¹ Therefore, where the deposit was made with the petitioner, as a solicitor, to secure the payment of *future* costs, and this was only done three weeks before the bankruptcy, the court refused to interfere.² So, where it appeared on the face of the petition, that the deposit of the deeds took place only nine days before the issuing of the fiat, and there was nothing to rebut the presumption of fraudulent preference, the court declined making the usual order, but directed the property to be sold, and the proceeds to be paid into court.³ In another case of this kind, the petition was dismissed with costs.⁴ And where the deposit was made twelve years before the issuing of the commission, and there was no written memorandum, the court refused to make any written order.⁵

But the mere circumstance of the deposit being made three weeks only before the issuing of the fiat, has been held not, of itself, sufficient to prevent the creditor from obtaining the usual order; ⁶ though if the assignees request an inquiry, on the ground that they have reason to doubt whether any consideration was given to the bankrupt by the equitable mortgagee, a reference will be directed to the commissioner to inquire into and report the circumstances; ⁷ but any reference to a commissioner to take an account of what is due upon a mortgage, involves, without any special directions, the duty of looking into the original consideration.⁸ In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances.⁹

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgage; and the *onus* lies upon the former, claiming a priority, to prove that the latter had such notice.¹⁰

Costs.] Disapprobation has been expressed of equitable mortgages being founded on a mere *parol* agreement,¹¹ as leaving an opening to perjury which the statute of frauds

¹ *Ex parte Atwood*, 2 M. & A. 24.
Ex parte Nunn, 1 Dea. 393.

² *Ex parte Wake*, 2 Dea. 352.

³ *Ex parte Ainsworth*, 2 Dea. 563. *Ex parte Dawdney*, 4 D. & C. 181.

⁴ *Ex parte Morgan*, 1 M. D. & D. 116.

⁵ *Ex parte Jones*, 3 M. & A. 152.

⁶ *Ex parte Heathcote*, 2 M. D. &

D. 711. *Ex parte Gillett*, 3 M. D. & D. 458.

⁷ *Re Hover*, 2 Molloy, 451. *Re Meara*, id. 453. *Ex parte Clouter*, 3 M. D. & D. 187.

⁸ *Re Thompson*, 3 Molloy, 78.

⁹ *Ex parte Martin*, 4 D. & C. 457.

¹⁰ *Ex parte Hardy*, 2 Dea. & C. 393.

¹¹ *Ex parte Hooper*, 2 Rose, 329.

was intended to prevent; but the doctrine has now been too long established to be disturbed.¹

In order, however, to discourage such mortgages when founded on a mere *parol* agreement, Lord Eldon introduced the practice of making a difference in the allowance of the costs attending the sale of the property where the deeds are deposited under the terms of a written agreement, and where there is no agreement in writing. If there is a written agreement, then the costs of the petition for the sale, and of all fair inquiries into the validity of the security, will be ordered to be satisfied out of the proceeds of the sale;² and though the written agreement requires the aid of *parol* testimony to explain it, the mortgagee will be equally entitled to costs.³ But if the written memorandum is lost, then the petitioner is not entitled to the costs occasioned by the loss of the memorandum, but those costs must be paid by him, as if there was no written memorandum.⁴ And where there is no written memorandum, the costs are always ordered to be paid by the mortgagee,⁵ and the same where the written memorandum does not specify the purpose for which the deeds are deposited,⁶—though, if the assignees oppose the petition for sale on frivolous or mistaken grounds, they will then be ordered to pay the costs occasioned by such opposition.⁷ Where, upon a deposit of deeds without writing, the mortgagee subsequently wrote a letter to the party directing him to hold the deeds, after payment of his own mortgage, for a second mortgagee,—this was held to exempt the first mortgagee from his liability to costs.⁸ Where some deposits of deeds are made with written memoranda, and others without, the costs will be apportioned, and only those allowed which relate to the deposits accompanied with memoranda.⁹

¹ *Ex parte Coming*, 9 Ves. 115. *Ex parte Wetherell*, 11 Ves. 398. *Ex parte Haigh*, *ibid.* 403. *Hankey v. Vernon*, 2 Cox, 12. *Hearn v. Mill*, 13 Ves. 114. *Ex parte Mountfort*, 14 Ves. 606. *Ex parte Coombe*, 17 Ves. 369; and see post, "Lien."

² *Ex parte Garbutt*, 2 Rose, 78. *Ex parte Trew*, 3 Mad. 372. *Ex parte Brightwen*, Buck. 148. *Ex parte Sikes*, Buck. 349. 1 Swanst. 3.

³ *Ex parte Vauxhall Bridge Company*, 1 G. & J. 101.

⁴ *Ex parte Rodgers*, 3 M. D. & D. 297.

⁵ *Ex parte Warry*, 19 Ves. 472. This however is not the practice in the courts of equity; *Reg. v. Chambers*, 4 Younge & C. 54.

⁶ *Ex parte Smith*, 1 M. D. & D. 165. *Ex parte Gillott*, 3 M. D. & D. 458.

⁷ *Ex parte Horne*, 1 Mad. 622. *Ex parte Bate*, 4 Dea. 46.

⁸ *Ex parte Reid*, Mont. & M. 114. *Ex parte Biadec*, 1 M. D. & D. 165. *Ex parte Corbett*, 1 M. D. & D. 689.

⁹ *Ex parte Thorpe*, 3 Dea. 85. *Ex parte Robinson*, 1 Dea. & C. 119. *Ex parte Ford*, 3 M. D. & D. 457.

Where several leases were deposited, accompanied with a written memorandum, and the creditor, eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other leasehold property as a substituted security, but without any fresh memorandum in writing, the creditor was held to be entitled to his costs.¹ But where the clerk of a creditor, claiming an equitable mortgage, drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt, but it was not signed by the bankrupt himself, nor even shown to him, nor was the clerk authorised by the bankrupt to draw up such memorandum,—the equitable mortgagee was held to be not entitled to costs.² And where a deposit of deeds was made, accompanied with a memorandum, to secure a particular debt, which was subsequently discharged, and on a fresh debt being contracted, it was verbally agreed that the deposit should continue as security for the latter debt, the equitable mortgagee was refused his costs, on the ground that the memorandum was exhausted.³ But a letter written some months after the deposit of deeds, acknowledging the purpose for which they were deposited, is a sufficient memorandum to entitle the equitable mortgagee to his costs.⁴ An equitable mortgagee, however, is not the more entitled to costs, because it was owing to the bankrupt that no regular mortgage was made.⁵

It is no answer to an application by an equitable mortgagee for the sale of a lease, that it contained a covenant against assigning without licence from the lessor, and that no licence had been obtained; for the lessor might perhaps waive the forfeiture, and the mortgagee has a right, as against the assignees, to avail himself of the advantage which he has by the possession of the lease.⁶ Nor is an equitable mortgagee bound to indemnify the assignees against any breach of covenant in the lease.⁷ When the property is sold, the assignees must join in the conveyance; for an equitable mortgagee cannot himself effect a valid assignment of the premises to a purchaser.⁸

An equitable mortgagee, applying for a sale, will not be

¹ Ex parte *Cobham*, 3 Dea. 609.

² Ex parte *Reid*, 1 Dea. & C. 250.

Ex parte *Emmerton*, 3 Dea. & C. 654.

³ Ex parte *Pigeon*, 2 Dea. & C. 118.

⁴ Ex parte *Reynolds*, 4 Dea. & C. 278.

⁵ Ex parte —, 2 Mad. 281.

⁶ Ex parte *Baglehole*, 1 Rose, 432.
Ex parte *Cocks*, 2 Dea. 14. Ex parte
Drake, 1 M. D. & D. 539.

⁷ Ex parte *Fletcher*, 1 Dea. & C. 318.

⁸ *Hawkins v. Ramsbottom*, 1 Pri. 138.

allowed the costs of an action which he had brought for the mortgage money.¹ The petition of an equitable mortgagee should be served upon the assignees, and not upon the solicitor.² And where an equitable mortgagee was the petitioning creditor, and also assignee, it was held that the petition for the sale should be served upon the bankrupt and a creditor.³

If, after the usual order, the assignees delay the sale, the proper course is, not to present a fresh petition for a sale, but to prosecute the former order.⁴ Where there are other liens on the same property, the court will not make an order for sale, unless all the parties are regularly before the court,⁵ for the interest of one of the mortgagees cannot alone be sold, as the conflicting claims would render the property of less value.

Where an equitable mortgagee applies to the court for the express purpose of leave to bid, he pays the costs of the petition; but he may ask for leave to bid in his petition for the sale of the property, without being subject to costs.⁶ If he should become the purchaser, he will not be excused, any more than a legal mortgagee, from paying the deposit money on the sale.⁷

An equitable mortgagee of an estate of which the bankrupt is legally the owner, may prove, without giving up his security, if the estate subject to the mortgage be so encumbered that the bankrupt would have no beneficial interest in it if the mortgage were removed.⁸

Where the deeds have been delivered for the express purpose of preparing a legal mortgage, which does not afterwards take effect, there has been much difference of opinion whether or not such a deposit will of itself amount to an equitable mortgage. In one case⁹ of this kind, where the deeds were delivered to an attorney to prepare a mortgage, and bankruptcy intervened before the mortgage was prepared and executed, Lord Thurlow decided, that, as the deeds were not deposited expressly for securing any particular sum, the creditor had no lien on them. And Sir William Grant, in a subsequent case before him, pronounced a similar decision.¹⁰ But Lord Kenyon determined, that

¹ *Ex parte Fletcher*, Mont. 454.

² *Ex parte Cooke*, 3 Dea. & C. 24.

³ *Re Parker*, 1 Mont. & B. 394.

⁴ *Ex parte Robinson*, 3 D. & C. 103.

⁵ *Ex parte Bignold*, 1 Dac. 515.
Ex parte Bury, 1 M. D. & D. 191.

⁶ *Ex parte Berkeley*, 4 Dea. & C.

572.

⁷ *Ex parte Stephens*, 2 M. & A. 31.

⁸ *Ex parte Taylor*, 3 M. D. & D. 576.

⁹ *Ex parte Bullell*, 2 Cox, 243.

¹⁰ *Norris v. Wilkinson*, 12 Ves. 193.

such a deposit amounted in equity to a mortgage, effectual from the time of the agreement to mortgage.¹ And in another case of this description, where the objection was taken, but in which none of the preceding cases appear to have been cited, Lord Eldon overruled the objection, saying, that the principle of equitable mortgage is, that the deposit of the deeds is evidence of the agreement to charge the estate, and that a deposit, for the express purpose of preparing the security of a legal mortgage, was stronger evidence of such agreement, than mere evidence of an implied intention.² This certainly appears to be more accordant with reason and good sense than the principle of the two preceding decisions, and it has accordingly been followed in subsequent cases.³ So, as we have already seen, an agreement in writing to execute a legal mortgage, without any deposit, creates an equitable mortgage.⁴

But where there is no evidence to explain what was the object of the deposit, the depository in that case has no lien on the deeds against the assignees; as, where a customer left a lease with his bankers, without stating for what purpose it was left, it was held, that the banker had no lien on it for their general balance.⁵ So, also, a deposit of deeds for a particular purpose will not give the depository a lien upon them for any other purpose; as, where deeds are deposited in order to obtain *further* credit, this will not create a lien upon them for what is due in respect of money *previously* advanced.⁶ But the expression "may advance" in a memorandum does not conclusively confine the security to future advances.⁷ Where, however, one of two partners deposit deeds for monies to be advanced to himself, this will not cover advances made to the partnership.⁸

Where a legal mortgage was executed by the bankrupt, in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and consequently an unavailable security; it was held that it did not operate as a merger of the equitable mortgage, and that the creditor was entitled to the usual order as equitable mortgagee.⁹

¹ *Edge v. Worthington*, 1 Cox, 211.

² *Ex parte Bruce*, 1 Rose, 374.
And see *Hockley v. Bantock*, 1 Russ. 141.

³ *Keys v. Williams*, 3 Young & C. 55.

⁴ *Ex parte Jones*, 4 D. & C. 750; ante, p. 202.

⁵ *Lucas v. Dorrien*, 7 Taunt. 164.
1 Moore, 29.

⁶ *Mouniford v. Scott*, 1 Turn. 274.
3 Mad. 34.

⁷ *Ex parte Smith*, 2 M. D. & D. 587.

⁸ *Ex parte Freen*, 2 G. & J. 246.

⁹ *Ex parte Harvey*, 3 Dea. 547.
And see *ex parte Smith*, 2 Dea. & C. 271.

Where only part of deeds deposited.] A deposit of only part of the title deeds of an estate, if there is *written* evidence that the object was to create a security upon the whole estate, will render the mortgage as complete as if all the deeds had been deposited.¹ But where a bankrupt, having agreed to execute a mortgage to *one* creditor, deposited with him all the title deeds to an estate, except the immediate conveyance to himself,—and deposited that conveyance with *another* creditor as a security for his debt, promising to send him the remainder of the title deeds,—but there was *no written* agreement in the case of either deposit,—the lord chancellor held, that neither creditor had either separately, or collectively, an equitable mortgage on the property;² as it was not the intention that the first creditor should have a mortgage until an actual one was executed to him, and the other was not to have an equitable mortgage, until he got possession of the whole of the title deeds. Where, however, a bankrupt deposited *all* the title deeds with a creditor to secure a sum of money, and afterwards fraudulently got possession of two of them, and deposited those two with another creditor for money advanced,—the first creditor was held not to have lost his lien by so parting with the deeds, and to have a preferable claim in equity to that of the last creditor.³ Indeed, it should seem, in such a case, that the last creditor would have no lien; for it has been held, that a person, who wrongfully obtains the possession of deeds, and deposits them with another in consideration of an advance of money, confers upon the depositary no lien on them,—notwithstanding the transaction was *bonâ fide* on the part of the depositary, and he had no notice of the wrongful possession of the other party.⁴

A deposit of copies of the *court rolls* of copyhold premises is such a deposit, as will create an equitable mortgage.⁵

A deposit of deeds in the hands of a *third person*—who may be fairly called a third person, abstracted from both parties—may be a good equitable mortgage, where there is a memorandum of agreement on the part of the mort-

¹ *Ex parte Wetherell*, 11 Ves. 398. *Ex parte Chippendale*, 1 Dea. 67. *Ex parte Edwards*, id. 611. *Ex parte Leathes*, 3 D. & C. 112. *Ex parte Arkwright*, 3 M. D. & D. 129.

² *Ex parte Pearce*, Buck. 525.

³ *Ex parte Meux*. *Ex parte Cawthorne*, 1 G. & J. 116. 240.

⁴ *Hooper v. Ramsbottom*, 1 Camp. 121; and see *Horre v. Parker*, 2 T. R. 276. *Ex parte Nesbitts*, 2 Sch. & Lef. 279.

⁵ *Ex parte Warner*, 1 Rose, 286.

gagor to assign his interest comprised in the deeds.¹ But where the bankrupt had deposited deeds in the hands of his own wife on behalf of the creditor, Lord Eldon said, it would be too dangerous to hold that the wife of the bankrupt was to be considered a depositary of his title deeds, for the benefit of any particular creditor; and that, therefore, such a claim to an equitable mortgage could not be supported.² And where a third person advanced money to the bankrupt, at the same time when the depositary made advances to him, and it was *verbally* agreed that the depositary was to retain the deeds, as a security for the other person, as well as for himself,—Lord Eldon refused to extend the lien beyond the advance of the actual depositary; though, if the depositary had advanced nothing, then he thought it might have been evidence of his being a trustee for the other person.³ But where the bankrupt agreed with a creditor that the debt should be paid out of the proceedings of certain property about to be sold, the deeds of which were then in the hands of W. L., it was held that the creditor might claim as equitable mortgagee, subject only to any proper lien of W. L.⁴ Where deeds were deposited by a *written* agreement with bankers, as a security for monies advanced, or to be advanced by them, and an alteration took place afterwards in the firm, and money transactions were had with the new firm,—it was held, that if it appeared to be the agreement or intention of the parties (notwithstanding the agreement might have been by *parol*) that the deeds originally deposited were to be held, as a security for advances by the new firm, that would be sufficient to give the *new* firm a lien on the deeds; for, though the deposit originally was only for a particular purpose, yet that purpose might be *enlarged* by a subsequent *parol* agreement.⁵

An equitable mortgagee may transfer his interest in the title deeds deposited with him to a third person.⁶ And it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second.⁷

¹ Ex parte *Heathcote*, 2 M. D. & D. 711.

² Ex parte *Coming*, 9 Ves. 115.

³ Ex parte *Whitbread*, 1 Rose, 299. 19 Ves. 209.

⁴ Ex parte *Greenhill*, 3 D. & C. 334.

⁵ Ex parte *Kensington*, 2 Ves. & B. 79. 2 Rose, 138. Ex parte

March, 2 Rose, 239. Ex parte *Brown*, *ibid.* 242, note. Ex parte *Alexander*, 1 G. & J. 409. Ex parte *Lloyd*, *ibid.* 389. Ex parte *Parr*, 4 D. & G. 426. Ex parte *Smith*, 2 M. D. & D. 314.

⁶ *Hobson v. Mellond*, 2 Mood. & R. 342.

⁷ Ex parte *Smith*, 2 M. D. & D. 587.

But a transfer of deeds from a depositary to a third person (who, at the request of the bankrupt, discharged the debt due from the bankrupt to the depositary) was held not to be such an assignment of them from the depositary, with reference to the time of original deposit, so as to overreach an act of bankruptcy committed before the transfer, and against the express words of a defeazance on a warrant of attorney from the bankrupt, stating that the deeds had been deposited with such third person by the bankrupt.¹

A deposit of deeds, in order to give a party a further security for an annuity previously granted, is a valid equitable mortgage, and not within the provisions of the Annuity Act;² such deeds, therefore, need not be registered.

Where the bankrupt having a mortgage term, deposited the mortgage deed with a party by way of equitable mortgage, and afterwards purchased the equity of redemption, it was held that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser.³

If an equitable mortgagee has proved for the whole amount of his debt before he applies for a sale, he cannot receive any part of the proceeds of the sale, until so much of his proof is expunged.⁴

Tacking.] Where title deeds were deposited to secure a particular sum, and afterwards a further sum was advanced by the creditor; after which, and also after the act of bankruptcy, a memorandum was signed by the bankrupt, charging the deeds with the payment of such further sum, as well as the original sum advanced by the creditor,—it was held that the memorandum not being hostile to the original agreement, the signature of it *after* the bankruptcy did not affect the deposit of the title deeds which took place *before*, and that the creditor was entitled to a lien for the whole amount.⁵ And an agreement, in writing, accompanying the deposit of title deeds to secure a specific sum, may also be entered as a security beyond that sum by a subsequent verbal agreement.⁶ But if a mortgage be by *deed*, a further charge by *parol* cannot be tacked to the original mortgage

¹ *Ex parte Coombe*, 1 Rose, 265.
¹⁷ Ves. 369.

² *Ex parte Price*, Buck. 221.

³ *Ex parte Tuffnell*, 4 D. & C. 29.

⁴ *Ex parte Sherington*, 1 M. D. & D. 195.

⁵ *Ex parte Langston*, 1 Rose, 26.
¹⁷ Ves. 227. *Ex parte Whitbread*,

¹⁹ Ves. 209. 1 Rose, 299. *Ex parte Hearne*, Buck. 165.

⁶ *Ex parte Nettleship*, 2 M. D. & D. 124.

debt;¹ for, where the first mortgage is by a legal conveyance, the mortgagee is never permitted afterwards to hold the estate as further charged, not by a legal contract, but by inference from the possession of the deeds. If, however, the further charge is by *bond*—though it is obscurely worded as to the agreement between the parties—that may be so tacked.² And a first mortgagee is entitled to tack a subsequent judgment, docketed before the execution of the second mortgage, though no execution on the judgment had issued at the time of the bankruptcy.³

But where an equitable mortgagee advanced a further sum, and took a warrant of attorney to secure that sum, and the bankrupt afterwards executed to him a conveyance, in trust, to sell, and after payment of the first sum, to pay the surplus to the bankrupt; and on the date of the conveyance judgment was entered up, and execution levied under the warrant of attorney for the last sum, part of which was satisfied by the levy; it was held, that the mortgagee was not entitled to tack the residue of the judgment debt.⁴

A mortgagee is entitled to tack one mortgage to another, on his petition for a sale, if the assignees decline an offer made by him to abandon all right of proof on their releasing the equity of redemption in both mortgages, and the right of tacking is the same, whether the party seeking relief is the mortgagor or the mortgagee.⁵

It was made a great question, before the recent changes in the bankrupt law, whether a mortgagee having the legal estate *before* the act of bankruptcy of the mortgagor, could tack a second mortgage made for further advances *after* the act of bankruptcy, without notice of the act of bankruptcy.⁶ But if the second mortgage is made before the issuing of the fiat, and the mortgagee has no notice of any act of bankruptcy, then there is no doubt, under the provisions of the 2 & 3 Vict. c. 29, that he may tack such second mortgage. In one case, indeed, it was held that he might tack the second mortgage, notwithstanding it was made subsequent to the commission, provided he had no notice of the

¹ *Ex parte Hooper*, 2 Rose, 328. 19 Ves. 477. 1 Mer. 7.

² *Ex parte Hearn*, Buck. 165.

³ *Baker v. Harris*, 16 Ves. 397; and see 11 Ves. 617. *Ex parte Cox*, 2 M. D. & D. 486.

⁴ *Ex parte Pettit*, 2 G. & J. 47.

⁵ *Ex parte Berridge*, 3 M. D. & D. 464.

⁶ *Ex parte Herbert*, 13 Ves. 183. *Latouche v. Lord Dunsany*, 1 Sch. & Lef. 152. *Ex parte Knott*, 11 Ves. 609. *Sugd. V. & P.* 721. *Collet v. De Golls*, Forrester, 65.

issuing of the commission.¹ But as the 6 Geo. 4, c. 16, s. 83, declares that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, there can be of course no right now to tack a second mortgage made after the issuing of the fiat.

An equitable mortgagee will be permitted, on consent, to make improvements on the property, and to add the amount of the expense to his charge on the mortgaged estate.²

Where during the pending of an appeal by an equitable mortgagee from a decision of the court of review, it was agreed between him and the assignees that the property should be sold, and the proceeds invested by the assignees to abide the event of the appeal, and a final order was made in favour of the mortgagee; it was held that, although he was entitled to the interest made by the assignees from the investment of the proceeds, he was not intitled to have interest calculated on his debt subsequent to the date of the fiat.³

Assignees are entitled to have the direction of the court, with regard to the rights of parties claiming to be equitable mortgagees of the bankrupt's property; and are therefore entitled to their costs of appearing on the petition of the equitable mortgagee out of the mortgage estate, notwithstanding they have been requested to concur in a sale, without a petition being presented.⁴ But we have seen that if they oppose the petition on frivolous grounds, they will be ordered to pay the costs occasioned by such opposition.⁵

Vendor's lien.] The vendor of an estate has a lien on it for the purchase money,⁶ on the principle that payment is an essential part of the contract; and if, upon a re-sale after the bankruptcy of the purchaser, the estate produces less, the vendor may apply the proceeds of the sale, first in liquidation of the charges of sale, and then of the purchase money, and be permitted to prove for the deficiency.⁷ And the same where the bankrupt contracts to buy shares in a public company, and the certificates of the shares are left in the hands of the vendor for the payment of part of the pur-

¹ *Hitchcock v. Sedgwick*, 2 Vern. 157. Sugd. V. & P. 721.

² *Ex parte Smith*, 2 Dea. 236.

³ *Ex parte Pollard*, 1 M. D. & D. 264.

⁴ *Ex parte Stevens*, 3 M. D. & D. 317.

⁵ *Ex parte Horne*, 1 Mad. 622. *Ex parte Bate*, 4 Dea. 46.

⁶ See the cases in Sugden, Law of V. & P., ch. 12; and post, Ch. XI. Part 2, "Lien."

⁷ *Bowles v. Rogers*, C. B. L. 123. *Ex parte Hunter*, 6 Ves. 94.

chase money.¹ And though the vendor may not have conveyed the estate to the bankrupt, and consequently has both the legal and equitable title in himself, yet he may, if he chooses, apply for a sale of the premises in discharge of his lien for the unpaid purchase money, and prove for any deficiency not satisfied by the produce of the sale.² And where a testator was in the habit of selling land to builders, and of advancing them money for the purpose of building on it, and authorised his executors to enter into similar contracts; it was held that the executors had a lien on the land sold by them for such advances.³ So, where the vendor agreed to sell the bankrupt some standing trees, to be cut and taken away within a limited time, and the bankrupt cut and took away only part of them, before the bankruptcy,—the vendor was held to have a lien upon what were still growing, and to be entitled to prove for the amount of the price of those taken away.⁴ But where a vendor sold timber, which was already felled and severed from the freehold, and the vendee took away part of it, and then became bankrupt,—it was considered doubtful in this case, whether the vendor had a lien upon the remainder, on the ground of the partial delivery amounting to a delivery in law of the whole; and an issue was directed on the point.⁵ The vendor's lien is not discharged by his taking bills of exchange, or any collateral security, for the amount of the purchase money,—unless it can be shown, that he agreed to rest on such collateral security.⁶ But where it was agreed between a mother and a son, that she join in conveying her life-interest in an estate to a purchaser, the son undertaking in consideration thereof to secure to her an annuity,—and after the execution of the conveyance, and before the annuity was secured, the son became bankrupt;—it was held, that the mother was not entitled to prove for the value of the life-estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy.⁷ An equitable mortgagee from a vendee, who has not paid the purchase money, can only sell the bankrupt's interest,

¹ *Ex parte Sheppard*, 2 M. D. & D. 431.

² *Ex parte Gyde*, 1 G. & J. 323. *Hope v. Booth*, 1 B. & Adol. 498.

³ *Ex parte Linden*, 1 M. D. & D. 428.

⁴ *Anon.* 4 Mont. B. L. Appendix, 16.

⁵ *Ex parte Grynede*. 12 Ves. 379.

⁶ *Ex parte Learing*, 2 Rose, 79. *Grant v. Mills*, 2 Ves. & B. 306. *Hughes v. Kearney*, 1 Sch. & Lef. 136. *Ex parte Parkes*, 1 G. & J. 229.

⁷ *Ex parte Brockliss*, Buck. 406.

unless the vendor consents, and the court will make no order until he be served with the petition.¹

Where money has been advanced by a creditor to the bankrupt, either upon a mortgage, or other security, which fails in consequence of the bankruptcy intervening, proof may be always made for the amount of the money advanced, in respect of the contract implied by law, from the loan.² And the same where the security fails for want of a proper stamp.³

If a security is deposited by a bankrupt generally with his creditor, to indemnify him for a balance then due, and for such sums of money as shall be afterwards advanced,—and at the time of the bankruptcy the creditor has two demands against the bankrupt, the one proveable under the fiat, and the other not,—he may apply his security, in the first place, to reduce that demand which is not proveable.⁴

Where a creditor had an assignment from the bankrupt of a contingent interest, to secure in part a debt exceeding the value of such interest, and the creditor insured against the contingency, and upon its taking effect received the sum insured,—it was held, that he could not prove for the whole debt, but that the sum recovered (being allowed what he had expended for effecting the insurance) must be deducted from the proof.⁵

Goods pledged as a security for money advanced are in the nature of a mortgage, and can only be redeemed upon payment of the money for which they are pledged. But when the person pledging becomes bankrupt, they cannot be retained (like title deeds in the case of an equitable mortgage) for *subsequent*⁶ advances. And goods pledged expressly to secure a creditor, who has previously accepted and paid bills drawn on him by the bankrupt, are released from further charge, as to other bills taken up and paid subsequently,—if the amount of the *original sum*, paid on account of the bankrupt, has been repaid to the creditor, without the goods being sold.⁷ A creditor having goods pledged with him in part security of his debt,—if he wishes to prove

¹ Ex parte Wright, 3 M. & A. 49.

² Ex parte Coming, 9 Ves. 115.

³ Alves v. Hodgson, 7 T. R. 241. Ruff v. Webb, 1 Esp. 129. Brown v. Watts, 1 Taunt. 353. Wilson v. Pyper, 4 Taunt. 298.

⁴ Ex parte Haveard, C. B. L. 124. Ex parte Arkley, Ibid. 126. Ex parte Hunter, 6 Ves. 94.

⁵ Ex parte Andrews, 2 Rose, 410. S. C. 1 Madd. 573.

⁶ Vanderzee v. Willis, 3 Bro. 21. Adams v. Claxton, 6 Ves. 726; and see Demainbray v. Metcalf, Prec. Cas. 416. 2 Vern. 691. Jones v. Smith, 2 Ves. 372; afterwards reversed in Dom. Proc.

⁷ Birdwood v. Raphael, 5 Pri. 593.

for the purpose of voting in the choice of assignees, and there is not sufficient time previously to have a sale,—may, on petition, obtain an order that a value shall be set upon the goods, according to the market price of the day of the choice of assignees, and prove for the difference between such value and the amount of his debt; the creditor undertaking that, if the goods sell for more than the value so set upon them, the excess of the proceeds shall be for the general benefit of the creditors.¹ But where it appears, clearly, that the delivery of the goods is not a pledge, but amounts to an undue preference, such an order will not be made.² The selling of a pledge by a creditor, without applying first to the commissioner, does not, (if there is no fraud in the transaction) destroy his right to prove the remainder of his debt.³

A creditor who has a deposit of goods for his debt and interest, and who at the request of the assignees delays the sale for a better market, and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the fiat.⁴

The agent of a bankrupt attorney may prove the amount of his whole debt, notwithstanding he retains in his hands certain securities and papers, which came into his possession as such agent, and upon which he has a lien.⁵

As to the right of a mortgagee to the “Rents and Profits,” see post Chap. XI., sections 1 and 3.

SECTION VII.

Debts payable in futuro.

By the 6 Geo. 4, c. 16, s. 51, any person who has given credit to the bankrupt upon valuable consideration for any money, which shall not have become payable when such bankrupt committed an act of bankruptcy,—whether the credit is given upon any written security, or not—may prove his debt, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only a rebate of interest at the rate of *5l. per cent.*, to be computed from the declaration of a dividend, up to the time such debt

¹ Ex parte *Greenwood*, Buck. 323.

² Ex parte *Smith*, 3 Bro. 46.

Ex parte *Barclay*, 1 G. & J. 279.

³ Ex parte *Geller*, 2 Madd. 262.

⁴ Ex parte *Kensington*, 1 Dea. 58.

⁵ Ex parte *Steele*, 16 Ves. 164.

would have become payable, according to the terms upon which it was contracted.

This section is nearly the same as the 9th section of the 49 Geo. 3, c. 121, which was framed to remedy many inconveniences under the former bankrupt laws. For before that statute, if a creditor had no security for his debt *in writing*,¹ and it was not payable till after his debtor became bankrupt—as in the case of goods sold to the bankrupt upon a certain credit—the creditor was unable to prove his debt under the commission; a disability, which was productive of equal injustice, both to the creditor and the bankrupt.² But now, by the above section, all debts contracted before the act of bankruptcy, and now by 2 & 3 Vict. c. 59, all debts contracted before the issuing of the fiat,—though not due till afterwards, can be proved, whether there is a written security or not, subject only to a deduction of 5*l.* *per cent.* discount. Therefore, where it was agreed upon a loan to the bankrupt, bearing interest, that six months' notice should be given before repayment was required, the debt was held to be proveable, though no notice was given before the bankruptcy.³

SECTION VIII.

Contingent Debts.

Contingent debts were formerly not proveable under a commission, whether the contingency was certain, or uncertain, unless it had happened before the act of bankruptcy.⁴ Thus, even a bill of exchange (where the contingency is certain) if not due till after the bankruptcy, could not (before the 7 Geo. 1, c. 31.) be proved;⁵—any more than a debt on a policy of insurance (where the contingency is uncertain) could before the 19 Geo. 2, c. 32, unless the contingency had taken effect before the bankruptcy. And, in more recent times, a bond to secure the replacing of stock on a particular day could not be proved, unless the day had arrived, or the condition was broken before the bankruptcy.⁶ Nay,

¹ *Ex parte E. I. Company*, 2 P. Wms. 395. *Hoskins v. Duperoy*, 9 East, 498.

² See *Paraloe v. Dearlove*, 4 East, 438.

³ *Ex parte Dowman*, 2 G. & J. 241.

⁴ *Ex parte E. I. Company*, 2 P. Wms. 396. *Ex parte Groome*, 1 Atk. 118. *Ex parte Barker*, 9 Ves. 110. *Hancock v. Entwistle*, 3 T. R. 435.

⁵ *Callowell v. Clutterbuck*, cit. 2 Str. 867.

⁶ *Ex parte King*, 8 Ves. 334.

even a warrant of attorney to confess judgment for an *existing debt*, being accompanied with a defeazance that judgment should not be entered up unless default was made in payment by a particular day, could not be proved, if the bankruptcy took place before that day arrived.¹ Many subtle and refined distinctions, also, were drawn between *debts accruing payable* on a contingency, and *present debts liable to be defeated* on a contingency.² These cases have now become merely matter of curiosity, in consequence of the important alteration made by the 6 Geo. 4, c. 16, in the proof of this species of debts;—an alteration, that is certainly not the least valuable of the different amendments in the law of bankruptcy, whether considered with a view to the affecting of substantial justice, or to the disentangling this species of proof from the intricacies with which it was so long perplexed.

The following is the alteration made by the 56th section of the last mentioned statutes:—

If any bankrupt shall, before the issuing of the commission, have contracted any debt payable on a contingency, which shall not have happened before the issuing of the commission, the person with whom the debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon it, and may prove the amount and receive dividends thereon; or, if the value shall not be ascertained before the contingency happens, he may then, after the contingency, prove in respect of the debt, so as not to disturb any former dividend. He is however, of course, prevented from proving, if, when the debt was contracted, he had notice of any act of bankruptcy committed by the bankrupt. This section, it has been held, has a retrospective operation both with respect to commissions which issued before the passing of the act, and to contingencies also which happened before that period.³

Under this section, it has been suggested by Lord Henley, that there is no reason why a guarantee for payment of goods should not be proveable against the bankrupt guaranteeing the payment, though the credit given to the purchaser be not expired;⁴ as well as a guarantee by the bankrupt to repay money lent to a third person, on receiving previous notice, although no notice was given before the commission.⁵ In each of these cases, the claim of the creditor against the

¹ *Staines v. Planck*, 8 T. R. 386.

⁴ *Ex parte Gordon*, 15 Ves. 286.

² *Ibid.*

⁵ *Ex parte Minet*, 14 Ves. 189;

³ *Ex parte Grundy*, Mont. & M.
293.

and see *Utterson v. Vernon*, 3 T. R.
539. 4 T. R. 570.

bankrupt has certainly been held to be contingent; but, at the same time, it seems rather difficult for the commissioner to set a value on the *chance* of payment by the principal debtor,—there being no rates of premium yet calculated for insurance against dishonesty, or insolvency. If, indeed, the credit had expired in the one case, or notice had been given in the other, and default made by the principal debtor—then, as a matter of course, the creditor could prove against the guarantee. Where, however, a guarantee can be considered as an original and absolute undertaking to pay the debt of a third person, at all events, in such a case the guarantee can hardly be considered as creating any *contingent* liability, and although in form it may be an undertaking that A. B. shall pay, yet it is at most an undertaking to pay by the hand of A. B.; and therefore such a guarantee would be proveable under a fiat against the party guaranteeing.¹

But where a bankrupt had covenanted for the due payment by A. B. of a premium upon a policy of insurance effected to secure a debt due from A. B. to a creditor; and the premium, having become unpaid by A. B. the bankrupt, was paid by the creditor only three days before the bankrupt obtained his certificate, it was held that this was no debt from the bankrupt, contingent or otherwise, but was only a mere claim for unliquidated damages.²

But where A. guaranteed to a banking company “all current obligations in their hands, to which B. might be a party, and also all his *future* obligations that might come into their hands,” it was held that the latter part of the guarantee, as to the future obligations, implied, of itself, a consideration, and did not require the specific statement of amount in the body of the guarantee, according to the requisition of the statute of frauds; and that the banking company might therefore, on the bankruptcy of A., prove for the amount of their advances to B., *subsequent* to the date of the guarantee.³

So, where A. agreed to sell to B. for 4,000*l.* a ship employed on a distant voyage, when she should arrive at her port of discharge in the united kingdom, and B. agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the

¹ *Lane v. Burghart*, 1 Q. B. Rep. 933.

Nash, p. 595. *Yallop v. Ebers*, 1 B. & Ad. 698. post 598. a.

² *Atwood v. Partridge*, 4 Bing. 209. And see post, *Bowman v.*

³ Ex parte *Littlejohn*, 3 M. D. & D. 182.

vessel, to deliver to A. two promissory notes for the amount of the purchase money, in default of which A. might sell the ship, and keep the proceeds in part of the purchase money, B. undertaking to pay to A. any deficiency within one calendar month after such sale; and in case the vessel should be lost, the agreement was to be void; and on the 27th of March the ship arrived, before which time B. became bankrupt, and on the 31st of March, A. gave notice of her arrival to the assignees, who declined to complete the contract, and A. sold the ship for 2,833*l.*; it was held, that this agreement amounted to a contract on the part of B. to pay a certain sum on a contingency, liable to be reduced on another contingency; and that A. could prove for the balance of the 4,000*l.*, after deducting the amount of the proceeds of the sale of the ship.¹

For further observations as to the proof of contingent debts, see post: "Marriage Articles," "Annuities," "Bonds," "Insurance," "Costs," "Damages," "Sureties."

SECTION IX.

Creditors by Marriage Articles.

The courts were formerly much hampered in the relief which they were able to afford the bankrupt's wife and children, under any settlement or bond made by him for their benefit at the time of his marriage. For, as no contingent debt could, as we have just seen, be proved, unless the contingency took place before the bankruptcy—and a provision of this kind is, from its very nature, generally uncertain and contingent, by reason of the different limitations as to death and survivorship—the wife and family of a bankrupt were often (under the old law) entirely defeated of the provision intended to be secured to them,—Lord Hardwicke observing, even in his time, that the different acts then existing had not made a sufficient provision for the relief of such sort of creditors.² Thus, although the husband, by marriage articles or bond, covenanted with trustees to leave his wife a certain sum, "*in case she survived him,*"—or to pay to trustees a certain sum, "*in case she died, leaving children who should attain the age of twenty-one*"—and the wife happened to be living at the time of the bankruptcy; it was held, that the trustees could, in neither case, prove the amount under the commis-

¹ *Ex parte Harrison*, 3 M. D. & D. 350.

² *Ex parte Groome*, 1 Atk. 117, 120.

sion.¹ And so, indeed, in every other case where the bankrupt had contracted to pay money on a contingency, which had not happened previous to the bankruptcy, and which might, or might not, happen afterwards. In some cases, however, where the contingency *had* happened after the bankruptcy, and before any distribution had been made of the bankrupt's effects, the court frequently, from the extreme hardship of the case, and more especially when the wife had brought a portion to her husband, would recommend the creditors to make some provision for her,—which was in general attended to.² And where a sum on bond was due to the wife of a trader, and settled in trust by a post-nuptial settlement, the settlement was, by the former bankrupt laws, void as against his assignees.³ When the assignees were obliged to come into a court of equity, to compel the performance of a trust, the court would then, as they required equity, make them do equity, by securing the intended settlement to the wife. Where, however, the contingency was *certain*, then, though it had not happened before the bankruptcy, the debt could, nevertheless, be proved under the 7 Geo. 1, c. 31, being *debitum in presenti solvendum in futuro*—as in the case of a bond payable at the death of the obligor, or upon any other event which was sure to happen within a reasonable time.⁴

But now, in all these cases, where the bankrupt binds himself to pay a sum upon a contingency, the trustees or parties interested may, under the 6 Geo. 4, c. 16, s. 56,⁵ apply to the commissioner to set a value on their contingent interest, such as it may be, and prove the amount under the fiat; or they may wait till the contingency happens, if they think that the more advantageous course, and then prove for the whole sum that has become payable.

Therefore, where a bankrupt covenanted, by his marriage settlement, that his heirs, executors, &c., should, within twelve calendar months after his decease, pay 4,000*l.* to trustees, upon trust, to pay the interest to his intended wife for

¹ Ex parte *Groome*, 1 Atk. 117, 120. Ex parte *Caswell*, 2 P. Wms. 497. Ex parte *Barker*, 9 Ves. 110. *Tully v. Sparkes*, Ld. Raym. 1546. Str. 867. Ex parte *Jeffries*, 7 Vin. 72. Ex parte *King, Davies*, 254. *Studdy v. Tingcombe*, 5 Ves. 695. Ex parte *Murphy*, 1 Sch. & Lef. 44. Ex parte *Mara*, 8 Ves. 335. Ex parte *Alcock*, 1 V. & B.

176. 1 Rose, 323. *Brandon v. Brandon*, 2 Swanst. 327.

² Ex parte *Greenway*, 1 Atk. 113. Ex parte *Mitchell*, *ibid.* 120. Ex parte *Groome*, *ibid.* 118. *Holland v. Calliford*, 2 Vern. 661.

³ *Wombwell v. Laver*, 2 Sim. 360.

⁴ Ex parte *Mitford*, 1 Bro. 398.

⁵ See ante, 213.

her life, and after her death, then to pay the principal sum to the children of the marriage, and if no children, then to the wife, if she survived her husband; but if not, then to the executors of the husband; it was held that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation, within the meaning of the above section; and that the trustees were therefore entitled to prove it under the commission.¹ But where the contingency depended upon the wife not living separate and apart from the husband, and after his death, upon her not marrying again,—this was held to be such a contingency as was incapable of valuation.² Where, however, a bankrupt, having received 550*l.* with his wife on his marriage, gave a bond to trustees, conditioned for the payment of 1,100*l.* “on receiving notice from the trustees;” it was held, that although no notice was given to the bankrupt before his bankruptcy, this was nevertheless a contingent debt within the provisions of the 56th section.³

Where the bankrupt wrote letters to his intended son-in-law, promising to pay an annuity to his daughter upon her marriage, this was held to be a sufficient agreement to entitle the daughter and her husband to prove for the value of the annuity.⁴ No debt, however, in consideration of marriage is provenable, without some memorandum in writing.⁵

Where the bond or covenant to secure a marriage portion was forfeited or broken before the bankruptcy, it could always in such a case be proved; for, by the breach of the condition, the penalty or sum covenanted to be paid becomes then a legal debt.⁶ And though the arrears of interest, in the payment of which default is made, are accepted after the forfeiture, it is not such a waiver of the forfeiture as to prevent the proof.⁷ In every case, also, where there was a remedy at law against the bankrupt before the bankruptcy upon the obligation he had entered into, the debt might always be proved;⁸ as where he entered into a bond or covenant to pay or invest money *forthwith*, or *as speedily as possible*, without any step being taken by the other party.

¹ Ex parte *Tindal*, Mont. 375, 462. 1 Deac. & C. 291. 8 Bing. 402. Overruling the decision of Lord Lyndhurst in Ex parte *Eagle*, Mont. & M. 422.

² Ex parte *Davis*, Mont. 298, 121.

³ Ex parte *Hooper*, 3 D & C. 655.

⁴ Ex parte *Silger*, Mont. 100.

⁵ Ex parte *Barter*, Mont. 135.

⁶ Ex parte *Winchester*, Davies, 530. 1 Atk. 116. Ex parte *Elder*, 2 Madd. 282. Ex parte *Rowlatt*, 2 Rose, 416. Ex parte *Dicken*, Buck. 115.

⁷ 1 Atk. 118.

⁸ Ex parte *Smith*, C. B. L. 212. Ex parte *Grainger*, 10 Ves. 349.

Settlement to avoid the bankrupt law.] But there are still some cases where a contingent provision in a marriage settlement cannot be proved under a fiat;—as, where a provision of this kind is made of the *husband's property*, and is expressly contrived for the purpose of avoiding the operation of the bankrupt laws. Thus, if a bond be given by a trader upon his marriage to trustees, to be forfeited upon the contingency of his *becoming insolvent, or a bankrupt*, such a bond cannot be proved,—on the principle, that it would be defeating the effect of the bankrupt law, and would be a fraud against the rest of the creditors.¹ So a settlement by the husband (though not in trade at the time, or intending then to trade) of freehold and leasehold estates, to the use of himself for life, unless he should embark in trade, and in the life of his wife become bankrupt—and from his decease or bankruptcy, then to secure an annuity to his wife—was, upon his afterwards engaging in trade and becoming bankrupt, held void as against his creditors.²

If, however, the wife brings a portion to the husband, then *her fortune*, or a proportionable part of the husband's property, may be settled upon the husband until his bankruptcy, and then to her separate use, or to the use of the children of the marriage;³ and if, in such a case, any part of the wife's fortune has been lent to her husband, the debt may be proved⁴ under a fiat against him. As, where in articles for the settlement of 10,000*l.* (which was only part of the wife's fortune) upon the husband till his bankruptcy, he covenanted to give a bond for 5,000*l.* upon the same trusts,—and then received all his wife's fortune, without making any settlement of his property on her,—proof was admitted under his bankruptcy, not only for the 10,000*l.*, but also for the 5,000*l.*, or for so much thereof as the value of the wife's property received by the husband would extend to, beyond the sum of 10,000*l.*⁵ So, where a trader, in consideration of

¹ Ex parte *Hill*, C. B. C. 228. Ex parte *Matthews*, *ibid.* Ex parte *Bennet*, *ibid.* 229. Ex parte *Cooke*, 8 Ves. 353. Ex parte *Hennay*, 1 Sch. & Lef. 46. Ex parte *Oxley*, 1 Ball. & B. 257. *Wise's Case*, Ca. temp. King, 46. Ex parte *Murphy*, 1 Sch. & Lef. 44. In the three first of these cases, the reasons for the judgment of the court are not noticed by Mr. Cooke; it is uncertain, therefore, whether it

proceeded on the ground of the contingency, or the fraud; most probably, however, on both grounds.

² *Higinbotham v. Holme*, 19 Ves. 88.

³ Ex parte *Brenchley*, 2 G. & J. 174.

⁴ *Lockyer v. Savage*, 2 Str. 947. Ex parte *Browne*, C. B. L. 215. *Stretton v. Hale*, 2 Bro: 490. Ex parte *Hinton*, 14 Ves. 598.

⁵ Ex parte *Cooke*, 8 Ves. 353.

his wife's fortune, conveyed his house to trustees, to his own use till death or bankruptcy,—and then, in either event, in trust to raise 1,000*l.* for her separate use; it was held to be a fair and valid settlement (in the nature of a mortgage) to secure the wife's fortune.¹ So, where a trader, on his marriage, in consideration of 150*l.* received from his wife, contracted to pay, when required, to trustees, a certain sum, the interest of which was to be paid to himself for life, or till his bankruptcy, and then to his wife, and after payment had been requested by the trustees, he became bankrupt, without having made any payment; it was held that the whole sum was provable, and the dividends applicable, 1st, to raise the 150*l.*, the interest of which was to be applied to the wife; and that the interest on any further sum was to be paid to the assignees for the life of the bankrupt, and afterwards according to the trusts of the settlement.² In one case also, where the *intention* of the parties was, that a bond by the husband to trustees for his wife's fortune should be provable in the event of his bankruptcy,—and it appeared that, through some mistake, it was omitted to be so provided in the marriage settlement; the bond was permitted to be proved under the commission.³

But in every case, where such a settlement is made in consideration of the *wife's fortune*, the proof of the trustees will be limited to the *amount* of what the husband has actually received of her fortune.⁴ For, where a trader on his marriage received a portion of 600*l.* with his wife, and in consideration thereof, and of the marriage, gave a bond for 1,000*l.* to a trustee, payable in six months, the interest to himself for life if he should continue solvent—but, in case of his death or insolvency, the interest to his wife for her life, and the principal among the children of the marriage,—Lord Redesdale only allowed proof to be made for the 600*l.*, and refused to permit the remaining 400*l.* to be proved—that being the property of the husband, and the settlement of it therefore fraudulent, according to the authority of all the cases.⁵ So, where by settlement previous to the marriage of the bankrupt, 6,000*l.* stock (half of which was the fortune of the wife) was assigned to trustees, in trust to pay the dividends to the bankrupt for life, or until he should become

¹ *Higginson v. Kelly*, 1 Ball & B. 252.

² *Ex parte Shute*, 1 Mont. & B. 385. 3 D. & C. 1. And see *Ex parte Wright*, 2 Dea. 551.

³ *Ex parte Verner*, *ibid.* 260.

⁴ *Ex parte Young*, Buck. 179.

⁵ *Madd.* 124. *Lester v. Gurland*, Mont. 471.

⁶ *In re Meagham*, 1 Sch. & Lef. 179.

bankrupt—and after his death or bankruptcy, then to pay the same to the wife; and the trustees were thereby directed also to stand possessed of a bond for 2,000*l.* (given by the bankrupt to the trustees) in trust, if there should be no issue of the marriage after the death of the bankrupt, to pay the interest thereof to the wife for life, *by way of increase* to the provision before made for her—and in case of issue living at the death of the bankrupt, the bond was to be delivered up to be cancelled; and the wife was living at the time of the bankruptcy, and there was no issue; Lord Eldon, under these circumstances, held that the bond was not proveable under the commission.¹ And in another case, where the husband covenanted, in consideration of certain contingent interests of the wife being conveyed to him, that his executors should, six months after his death, pay 3,000*l.* to trustees,—it was held, that they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bankruptcy.²

In some cases, the trustees will not be permitted to prove for the whole amount even of the wife's property, whether received by the husband or not, if any part of such property does not come within the terms of the settlement. Thus, where the husband gave a bond to a trustee to enable him, in case of bankruptcy, to come in as a creditor, as well for the sum of 500*l.*, as for so much beyond that sum as could be ascertained to be the distributive share of the wife in *her father's property*,—and the wife was entitled (besides this 500*l.*) to a legacy of 80*l.* under the will of *her brother*, which was received by the husband,—Lord Eldon allowed the trustee only to prove for the 500*l.*, and ordered the claim for the 80*l.* to be struck out.³

Where the husband makes a *false representation* at the time of his marriage of the amount of his *own property*, and covenants with trustees to settle estates or money upon his wife, which he is not entitled to or does not possess, and the marriage takes effect upon the faith of such representation,—then the trustees, in order that the wife may not be left wholly destitute by such a fraud, will be permitted to prove for the amount of the sum which was so covenanted to be settled. As where, by a settlement made before marriage, it was recited that the intended husband had 1,000*l.* and upwards employed in his trade, and it was agreed that 500*l.*

¹ *Ex parte Taafe*, 1 G. & J. 110.

² *Ex parte Hodgson*, 19 Ves.

³ *Ex parte Young*, 3 Madd. 124. 206.
Buck. 179.

part thereof should be vested in trustees, upon trust for the separate use of the wife for life, and after her death, then for the husband and the children of the marriage,—and it appeared that the representation in the settlement was unfounded, and the money was never paid,—and the husband became a bankrupt, and died, leaving his widow surviving, but no children;—upon a petition by the trustees to prove for the 500*l.*, Lord Eldon said, that on the authority of the case of *Montefiori v. Montefiori*,¹ and many others, the husband was bound to make good the representation in his marriage settlement; and he made an order, permitting the trustees to prove, and directing it to be recited in the order, that it appeared that the representation in the marriage settlement was *false* at the time it was made, and that the marriage was bad upon the faith of that representation.² So, where by settlement previous to the marriage the husband covenanted, in consideration of the marriage, to transfer immediately afterwards, or whenever requested by the trustees, 2,000*l.* stock (which was falsely alleged to be standing in his name) into the names of the trustees, upon the trusts of the settlement; and the trustees frequently after the marriage requested the husband to transfer the stock, which he repeatedly promised to do, but never did, and became bankrupt; the trustees were in this case permitted to prove the value of the 2,000*l.* stock, upon filing a previous affidavit as to the time at which the request was made, with reference to the then price of stock, which the commissioners were directed to ascertain.³ Where the trustees lend the wife's money to the husband with her consent, they cannot prove for the interest of the money, but only for the principal; she having been supported by the husband since the marriage.⁴

Whenever the bond, or covenant, is for the investment of money or transfer of stock, *upon request*, the specific time of the request should be correctly ascertained; for the amount of the proof will be regulated by the price of the stock at the time the request was made.⁵ If the request has not been made before the bankruptcy, the amount of proof will then, perhaps, depend upon the price of the stock on the day of fiat.⁶

And in all these cases—whether the sum permitted to be

¹ 1 Bl. 363.

² Ex parte *Gardner*, 11 Ves. 40.

³ Ex parte *Campbell*, 16 Ves.

144.

⁴ Ex parte *Green* 2 D. & C. 113.

⁵ Ibid. Ex parte *Mace*, 8 Ves. 335.

⁶ Ex parte *Day*, 7 Ves. 303. Ex parte *Leigh*, 1 Mont. Dig. 229.

proved is the original property either of the husband, or of the wife—if the husband is entitled to the interest for life, or to a subsequent contingent interest, the court will order the dividends on the sum proved to accumulate as a fund, the interest of which fund the assignees will be permitted to receive, if the bankrupt is entitled to a life-interest in the property,—the fund itself being kept together, to await any future contingency declared by the marriage settlement. When that contingency takes place, it will then either be applied to the purposes of the trust, or be distributed amongst the creditors of the bankrupt, as the circumstances of the case may be.¹ Therefore, where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.*, the interest of which the bankrupt, by the terms of the marriage settlement, was entitled to during his life, and after his death the principal was to go to his wife; and the bankrupt made default in payment of the money; it was held that the trustees might prove for the 3000*l.*, and that the interest upon the dividends received under such proof, should accumulate until the 3000*l.* was realized; after which, and not before, the interest might be paid to the assignees for the benefit of the creditors.²

SECTION X.

Creditors of a Bankrupt Executor, or Trustee, and herein of the Executors of a Creditor.

Where an executor or trustee becomes bankrupt,—as he acts in *auter droit*, his bankruptcy does not take away his rights as executor, or trustee; and whatever property he may possess in either capacity, which can be distinguished from his own, is not affected by any claim of his³ assignees, who are bound to account for it, and deliver it up to the persons really entitled to it. And in such a case, it is specially provided by the 6 Geo. 4, c. 16, s. 79,⁴ that where the bankrupt, as trustee, is possessed of any real or personal

¹ *Holland v. Calliford*, 2 Vern. 662. Ex parte *Grooms*, 1 Atk. 117. Ex parte *Smith*, C. B. L. 212. Ex parte *Mitford*, 1 Bro. 398. *Stratton v. Hale*, 2 Bro. 489.

² Ex parte *Turpin*, 1 D. & C. 120, Mont. 443. And see Ex parte *Saunders*, 3 D. & C. 568. Ex parte *King*, 1 Dea. 143.

³ *Bennet v. Davies*, 2 P. Wms. 318. *Rez v. Eggington*, 1 T. R. 370. *Howard v. Jemmett*, 3 Burr. 1369. Ex parte *Ellis*, 1 Atk. 101. Ex parte *Likwellyn*, 1 C. B. L. 137.

⁴ Ex parte *Saunders*, 2 G. & J. 132.

estate, or has any *stock* standing in his name, as trustee, either alone or jointly, the lord chancellor may order the assignees, and all persons whose act or consent is necessary, to convey or transfer such estate or stock, to such persons as he shall think fit, upon the same trusts as it was subject to before the bankruptcy: where the trust property is, under this section, ordered to be conveyed to a new trustee, there is no necessity for the assignees to join in the conveyance.¹ And the court may order trust property to be conveyed, either to *one* or *more* trustees, in the room of a bankrupt trustee.²

The usual practice was to refer it to the master, to approve of a proper trustee in the room of the bankrupt. But, as that is attended with expense, when the property is small, the order will be made without a reference.³ On the application of the *cestui que trust*,⁴ and an affidavit of the fitness of the proposed trustee,⁵ where one person is solely entitled to all the trust estate, the court will in that case order the bankrupt to transfer and deliver it to such person, without appointing a new trustee.⁶

The appointment of a new trustee, in the room of a bankrupt trustee, is quite a matter of course, if urged by the parties beneficially interested;⁷ and this although he has obtained his certificate, and the trust property is in the hands of a receiver.⁸ But all the parties interested in the trust funds, must have notice of the application, and although one resides out of the jurisdiction, notice must nevertheless be given to such party.⁹

But where the testator's property cannot be distinguished from the general mass of property in the possession of the bankrupt, or when the bankrupt has been guilty of a breach of trust in applying trust property to his own use, proof must then be made for the amount due to the testator's estate, in such manner as shall be directed by the court of review.

As to bankrupt proving against his own estate.] Formerly, the commissioners in such a case frequently admitted the bankrupt to prove against his own estate, without obtaining

¹ Ex parte *Painter*, 2 D. & C. 584.

² Ex parte *Wilkinson*, 2 Dea. 151.

³ Ex parte *Inkersole*, 2 G. & J.

280. Ex parte *Buffery*, 2 D. & C.

576. Ex parte *Stubbs*, 2 M. D. & D.

570.

⁴ Re *Remington*, 3 D. & C. 24.

⁵ Ex parte *Beveridge*, 4 D. & C. 455. Ex parte *Palmer*, 4 Dea. 177.

⁶ Ex parte *Hancox*, Mont. 247.

⁷ Ex parte *Smith*, 4 Dea. 214.

⁸ *Bainbrigg v. Blair*, 1 Beav. 495.

⁹ Ex parte *Hardman*, 3 M. D. & D. 559.

previously any order of the chancellor; but, as this, introduced into his character the double and inconsistent relation of debtor and creditor, and as the commissioners had no power, like the chancellor, to annex a condition to the proof, that the funds should not come into the hands of the bankrupt,—Lord Eldon very strongly discountenanced proof being admitted under these circumstances, on the mere authority of the commissioners.¹ And, in a subsequent case, where the bankrupt, who was executor of one of his creditors, proved the debt under his own commission, without previously obtaining the order of the lord chancellor, and upon that proof signed and carried his certificate,—Lord Eldon ordered the proof to be expunged, and sent the certificate back to the commissioners.² It is therefore now settled, that a bankrupt executor is not entitled to prove under his own fiat, without the special order of the court. And the court, moreover, will not make such an order, except in a case perfectly harmless, nor without special directions that the dividends shall not be received by the bankrupt.³ But where one of several *executors* becomes bankrupt, the others may prove against his estate,⁴ without any order for that purpose;⁵ though this is otherwise in the case of *trustees*.⁶

Where the bankrupt has been guilty of a breach of trust, or has committed a *devastavit*, the court will not permit him to prove at all, but will order one of the legatees, or other persons interested in the property of the testator, to prove on behalf of himself and the other parties interested.⁷ And the costs of the assignees, on a petition for this purpose, come out of the bankrupt's estate.⁸ Thus, where two executors sold out trust money in the funds, for the benefit of one of them who died insolvent, and the survivor afterwards became bankrupt,—it was held, that the person interested in the trust fund might prove against the estate of the bankrupt the amount of the stock sold out, according to its value at the time of the bankruptcy. The funds in this case having risen considerably between the time of sale and the date of the commission, the order was made with reference to the rule in equity, that where a trustee has made use of the

¹ Ex parte *Shaw*, 1 G. & J. 127, where there is a luminous judgment of Lord Eldon's upon this, and other points.

² Ex parte *Marshall*, 1 G. & J. 163, note.

³ Per Lord Eldon, 1 G. & J. 161.

Ex parte *Colman*, 2 D. & C. 584.

⁴ Ex parte *Brown*, 1 D. & C. 118.

⁵ Ex parte *Courtney*, 4 D. & C. 456.

⁶ Ex parte *Phillips*, 2 Dea. 384.

⁷ Ex parte *Shakeshaft*, 3 Bro.

197. Ex parte *Fairchild*, 1 G. & J.

221. Ex parte *Vine*, 1 D. & C. 357.

⁸ Ex parte *Bridgman*, 2 M. D. & D. 692.

trust fund, he may be compelled by the *cestui que trust*, either to replace the fund, or to account for what he made of it, as it should appear most for the benefit of the *cestui que trust*.¹ And it seems, that such an order for proof may be obtained in the first instance, without a previous application² to the commissioner. In one case, where the property was small, a creditor of the testator was permitted to prove for the amount of such part of the testator's property, as had come to the bankrupt's hands.³

Where an executor, who was directed to carry on his testator's partnership trade, exceeded his authority, by employing the assets in the trade to an extent not warranted by the will, and the surviving partner and the executor became bankrupt, the bankrupt executor in this case was allowed to prove the excess of the assets so employed under a joint commission against him and the surviving partner.⁴ But if an executor, who is directed to carry on his testator's trade, do not go beyond his authority, then the assets employed by him in the trade can never be proved under the fiat, for they are then a part of the capital of the trade to pay its debts; but this is not the case, where he commits a breach of trust, by using the assets to an extent not authorised by the will.⁵

Where a sum was paid to one trustee on account of the trust fund, and he lent it to the other trustee upon note, and both became bankrupt, proof was permitted to be made for the amount under each commission.⁶

But where by an anti-nuptial settlement, the intended wife assigned a debt due to her from A., and another debt due from B., to A. and B., upon certain trusts, and neither of the debts was invested according to the trusts, but A. and B. continued to pay interest on their respective debts to the *cestui que trusts*, until B. became bankrupt; it was held, the proof could only be made by the *cestui que trusts* for the amount of the debt due from B.⁷

Where a testator indebted on bond devised his real estate to the bankrupt and two other trustees, for payment of his debts, and the bond creditor brought an action against the

¹ Ex parte Shakeshaft, 3 Bro. 197. Ex parte Fairchild, 1 G. & J. 221. Ex parte Gurner, 1 M. D. & D. 497.

² Ex parte Moody. Ex parte Preston, 2 Rose, 413.

³ Ex parte Leake, 2 Bro. 596.

⁴ Ex parte Richardson, Buck.

203, 421. Ex parte Garland, 10 Ves. 110. Contra Hankey v Hammon, ibid. 210.

⁵ Ibid 209.

⁶ Keble v. Thompson, 3 Bro. 112.

⁷ Ex parte Woodward, 2 Dea. 401.

trustees, and recovered a joint judgment against them; it was held, that he could not prove under a separate commission against the bankrupt, even for the purpose of voting in the choice of assignees.¹

Where infant *cestui que trusts* were entitled to a sum of stock standing in the names of trustees, subject to a life interest in their mother, and to a power of appointment, which had not been exercised, and the trustees, in violation of the trust, sold out the stock, and advanced the proceeds to the father of the *cestui que trusts*; and in a chancery suit instituted against them by one of the infants, the trustees were ordered to pay into court the amount which they admitted to have received upon such sale, and they afterwards became insolvent, and one became bankrupt; it was held, that the *cestui que trusts* were not entitled to an order to prove against the estate of the bankrupt, either for the value of the original sum of stock, or for the sum ordered to be paid into court, but only to an order to go in and make such proof as they could establish; and the dividends on the proof to be paid into court.²

In another case of this kind, before any order had been made by the court of chancery, the *cestui que trusts* were only permitted to enter a claim for the amount due to them without prejudice to the chancery suit; and all dividends in respect of the claim were ordered to be transferred by the accountant in bankruptcy to the credit of the bankrupt and of the suit.³

Where a *cestui que trust* applies for the removal of a bankrupt trustee, and serves the bankrupt with the petition, the bankrupt is entitled to the costs of his appearance.⁴

Where a party obtains the possession of, and exercises dominion over trust property, knowing it to be such, he is responsible to the *cestui que trusts*, in the same manner as if he had been duly appointed trustee; and consequently, the *cestui que trusts* may prove for the amount, without being barred by the statute of limitations.⁵

Where a trustee himself proves under a fiat, the *cestui que trust* should join in the proof; but if there is any difficulty in obtaining the attendance of the latter, then an order may be obtained for the trustee to prove alone.⁶

¹ Ex parte *Pearse*, 2 D. & C. 451.

⁴ Ex parte *Whitley*, 1 Dea. 478.

² Ex parte *Coles*, 3 M. D. & D. 327.

⁵ Ex parte *Gowers*, 2 Dea. 207.

⁶ Ex parte *Dubois*, 1 Cox. 310.

³ Ex parte *Stutely*, 1 M. D. & D. 643.

Beardmore v. Cruttenden, C. B. 1. 211. Green, 149.

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee.¹

In some cases a receiver has been appointed, *on petition*, to prove what is due, and to receive the dividends on the proof.² But where the testator's property is considerable, or it is necessary to take an account of the assets, Lord Thurlow held, that the creditors of the testator must proceed *by bill*,³ and it has also more recently been decided by Lord Eldon, that a receiver can only be appointed *by bill*.⁴ When proof is thus made against a bankrupt trustee, the court has been accustomed to direct, for the security of the parties interested, that the dividends shall be paid into the bank by the assignees, subject to further orders.⁵ But where a *cestui que trust* is entitled absolutely to any share in the trust property, and has attained twenty-one, the assignees in that case, will be ordered to pay to him at once the dividends payable upon his proof.⁶

Legatees.] If a legacy be given to a legatee, payable at twenty-one, or marriage, with interest, it is a vested legacy, and the legatee may prove it under a fiat, against the executor; or, if he has not attained twenty-one, or been married, his guardian, upon petition, will then be permitted to prove it.⁷ And where five children of a bankrupt had vested interests under a will (of which the bankrupt was executor) in certain trust funds after the death of their mother, subject to a power of appointment to be exercised by their father and mother, or the survivor of them, and the bankrupt had converted the trust property to his own use,—it was held, that, as no appointment had been made, each of the five children was entitled to prove one fifth part of the trust funds against the estate of the bankrupt, notwithstanding their father (who was the bankrupt) and their mother were both still alive.⁸

¹ Ex parte Orgill, 2 Dea. & C. 413.

² Ex parte Ellis, 1 Atk. 101. Ex parte Leicellyn, 1 C. B. L. 137.

³ Ex parte Leeke, *suprà*.

⁴ Ex parte Tupper, 1 Rose, 179; and see ex parte Markland, 2 P. Wms. 546. Ex parte Whitfield, 2 Atk. 315.

⁵ Ex parte Leeke, *suprà*. Ex parte Brookes, C. B. L. 138. Ex

parte Shakeshaft. Ex parte Moody, Ex parte Fairchild, *suprà*, 1 G. & J. 167.

⁶ Ex parte Kettlewell, 1 G. & J. 323.

⁷ Walcott v. Hall, 2 Bro. 305; and see ex parte Hudson, 2 M. D. & D. 177.

⁸ Ex parte Beilby, 1 G. & J. 167.

And where a legacy of stock was bequeathed to the separate use of the bankrupt's wife, she was permitted, on a petition by her next friend, to prove the value of the stock which had been transferred into the name of her husband, and sold out by him before his bankruptcy, and a trustee was appointed to receive the dividends.¹

If the bankrupt, besides being executor, is beneficially entitled to any part of the testator's property, his interest, of course, passes to the assignees; and the lord chancellor will, if necessary, let the assignees sue in the bankrupt's name, in order to get in the effects.² And though the executor had committed a *devastavit*, who was entitled in his own right to a specific legacy, which was sold by his assignees,—it was held, that the produce of such sale in their hands was not liable to make good the *devastavit*; but that the parties beneficially entitled must prove to the amount of the *devastavit*.³

But where a bankrupt, being residuary legatee and executor under a will had not invested a legacy pursuant to the trusts of the will, and was permitted to prove against his own estate, for a sum much larger than the amount of the legacy, in respect of a *devastavit* which he had committed; it was held that the legatee was entitled to be 'paid in full the amount of the legacy out of the dividends on the profit, and that the remainder only of the dividends belonged to the assignees.'⁴

Where an executor commits a *devastavit*, interest at 5l. per cent. is to be added to the principal sum proveable against his estate.⁵

Where the co-executors of a bankrupt executor paid the amount of the sum proved against his estate, in discharge of their own liability, they are entitled to the benefit of the proof.⁶

If an executrix marries, and her husband becomes bankrupt, having previously admitted assets, in answer to a bill filed against them, the assets in this case become a debt of the husband, and may be proved under his fiat.⁷

Costs of suit incurred by a bankrupt executor in an action which is brought against him after the issuing of the

¹ Ex parte *Wells*, 2 M. D. & D. 504.

² Ex parte *Butler*, Amb. 74. *Bedford v. Woodham*, 4 Ves. 40.

³ *Geary v. Beaumont*, 3 Meriv. 431.

⁴ Ex parte *Turner*, 2 M. D. & D. 613.

⁵ *Bick v. Molly*, 2 Myl. & K. 312.

⁶ *Lincoln v. Wright*, 4 Beav. 427.

⁷ 1 Sch. & Lef. 113

fiat, although he pleads a false plea, are not proveable under the fiat.¹

Executors of a creditor.] If a creditor of the bankrupt is dead, the proper person to prove is, of course, the creditor's executor or administrator. And where a debt was forgiven the bankrupt by a testator, upon condition that the bankrupt should pay an annuity to his sister, but if he failed in doing so, the executrix was to call in the whole debt,—and default was made by the bankrupt in the payment of the annuity,—the executrix was permitted in this case to prove the debt.² And where the bankrupt, and another person who was solvent, were joint executors of the creditor, Lord Thurlow permitted the solvent executor to prove the debt under the commission, notwithstanding a pending suit in the ecclesiastical court as to the executorship: but the dividends were ordered to be paid into the bank, pending the contest in the ecclesiastical court.³

Where an *assignee* becomes bankrupt, with monies in his hands, his estate will not be entitled to any dividends on the proof made by him under the estate of which he was assignee, until full reimbursement is made to the last mentioned estate of the money, which he had in his hands at the time of his bankruptcy.⁴

SECTION XI.

Creditors by Annuities.

The original cases in bankruptcy, as to the proof of annuity bonds forfeited before the bankruptcy of the grantor of the annuity, considered the penalty of the bond as the debt,—not indeed as wholly receivable by the obligee, but to stand as a security for the payment of the annuity; and Lord Hardwicke's first rule was, if there were sufficient assets, merely to order the annuity to be paid half yearly, down to the death of the annuitant. But this mode of proceeding was afterwards altered⁵ by him, for the better convenience of distribution. For, if the annuity was to be received from time to time as an accruing debt on the estate,

¹ *Howard v. Jemmet*, 3 Burr. 1368.

² *Ex parte English*, 2 Bro. 609; and see *ex parte Bridges*, 4 Madd. 269. ante.

³ *Ex parte John Shakeshaft*. 3 Bro. 198.

⁴ *Ex parte Bignold*, 2 Mad. 470.

⁵ *Per Lord Eldon*, 19 Ves. 245.

that would tend to make the division of the estate perpetual; and there could, at all events, be no final division during the annuitant's life. To avoid, therefore, this inconvenience, and in order to attain a dividend at a certain time, the courts afterwards allowed a value to be set on the annuity,¹ and the annuitant to come in as a creditor for that value under the commission. There was also a distinction made before the 49 G. 3, c. 121, s. 17, (which was the first act that authorised direct proof of annuities *eo nomine*) between a *covenant*, and a *bond*, for the payment of an annuity: in the first case the arrears only of the annuity could be proved, —in the last, if the bond was forfeited *before* the bankruptcy, then the value of the annuity, as well as the arrears, was proveable.² And this rule of setting a value on the annuity was confined to cases where the annuity was secured by some instrument with a penalty, which had become forfeited *before* the bankruptcy of the grantor, by his permitting the annuity to become in arrear and unpaid.³ For where there were no arrears due at the time of the bankruptcy, it was considered in some cases, that there was no debt then due at law, but a mere contingency as to the penalty becoming a debt *in futuro*, by the subsequent non-payment of the annuity.⁴ If a forfeiture, however, had once happened, the receiving payment afterwards of the arrears was held not to be such a waiver of the forfeiture, as to take the case out of the general rule.⁵

Ascertaining the value.] The 6 Geo. 4, c. 16, adopts a similar provision for the proof of annuities, as was introduced by the 49 Geo. 3, c. 121, s. 17, with additional directions as the mode of calculating the value. Thus, by sect. 54, it is enacted, that by *whatever assurance* the annuity is secured, and whether there are, or are not, any arrears due at the time of the bankruptcy, the annuity creditor may prove for the value of the annuity; which value the commissioners are to ascertain, with regard to the original price given

¹ Ex parte *Artis*, 2 Ves. 489.

² *Cotteral v. Kooke*, Doug. 97.

³ Ex parte *Le Compte*, 1 Atk. 251. Ex parte *Belton*, Ibid. Ex parte *Burrow*, 1 Bro. 268. Ex parte *Rowlatt*, 2 Rose, 416; and see *Cullen*, 92.

⁴ *Perkins v. Kempland*, 2 Bl. 1106; but see *Pattison v. Bankes*, Cowp. 540, where there was no forfeiture before the bankruptcy,

and yet the bond was held proveable under the 7 G. 1, c. 31, as being for a debt payable at a future day. See also *Brooks v. Lloyd*, 1 T. R. 17, which was the case of a bond payable by instalments, and which was held provable for the same reason, though there was no default before the bankruptcy.

⁵ *Wyllie v. Wilkes*, Doug. 519. 2 Bl. 1108.

for the annuity, deducting therefrom such diminution in the value, as shall have been caused by the lapse of time, since the grant of the annuity to the date of the commission.

This mode of ascertaining the value is consistent with the rule laid down previously by Lord Eldon, who held, that, if there were not any special circumstances, the commissioners should ascertain the value upon the basis of the original sum paid, qualified by the time of enjoyment.¹ And the state of the money market is not a circumstance which can affect this rule.² Under some circumstances, however, the rule, if strictly followed, might be productive of injustice. As, where a person in a bad state of health, which is known to the grantor, purchases an annuity of him for a sum less than the usual market price, and soon afterwards recovers, whereby the value of the annuity is, of course, considerably improved;—in this case, as the probability was (when the annuity was granted) that the purchase would turn out to the disadvantage of the annuitant, it seems but just, that he should be allowed the benefit of his restoration to health having operated in his favour.³ And, indeed, in such a case before the new statute, Lord Eldon permitted proof to be made, upon a calculation with reference to the age and improved health of the annuitant, notwithstanding the value so ascertained exceeded the price originally given for the annuity, and the grantee had enjoyed the annuity for the space of two years.⁴ Sir J. Leach, however, in a subsequent case decided, that the commissioners are now precluded by the above section of the statute, from taking into consideration the altered state of the health of the annuitant; and that, where the consideration for the annuity is not money, but property, the price paid by the grantee for that property is not the criterion of value, if such value be altered by accidental circumstances.⁵ In a case of a peculiar kind which came before Lord Thurlow, he permitted the whole penalty of the annuity bond to be proved without regard to the time of enjoyment, and without any deduction of the payment of the annuity.⁶

An annuity granted for a term of years, the consideration

¹ Ex parte *Whitehead*, 19 Ves. 557. 2 Rose, 358. 1 Meriv. 10, 127; and see 1 Atk. 251.

² Ex parte *Webb*, 2 G. & J. 29.

³ Ex parte *Thistlewood*, 1 Rose, 290. 19 Ves. 236. It may be argued, however, on the other side of the question, that the grantor

would not have granted so large an annuity, for so low a price, unless he had reckoned upon the annuitant's bad state of health.

⁴ *Ibid.*

⁵ Ex parte *Fisher*, 2 G. & J. 102.

⁶ Ex parte *English*, 2 Bro. 609.

for which was the goodwill of a business, may be ordered to be valued, according to the directions of the 6 Geo. 4, c. 16, s. 54; the price given for the annuity being in fact the value of the goodwill of the business.¹

If the valuation of an annuity by the commissioners is not satisfactory, the court may determine the value on affidavits, or direct an issue.² Where the bankrupt granted an annuity of 42*l.*, in consideration of 400*l.*, and received the whole of the consideration money, through the medium of the attorney employed by him in the transaction; and half an hour afterwards, at a different place, he repaid 100*l.* of this same to the attorney, in discharge of a debt; it was held that this was not a return, or retainer, of part of the consideration money, within the provisions of the annuity act, and that the value of the annuity was provable under the fiat.³ And where the Bankrupt had acknowledged to have received the consideration money in the annuity deed, and admitted the same sum, also, to be due from him in an account between him and the annuity creditor, and the annuity was paid by him for ten years, without any impeachment of the consideration, the court would not reject the right of the creditor to prove for the value, because the bankrupt had made an affidavit that the whole of the consideration money, as stated in the memorial, was not advanced by the creditor.⁴

Where A. and B., for a valuable consideration, joined with C., as their surety, in granting an annuity to D.; and the three jointly, and any two of them separately, covenanted that the three, or some or one of them, should well and truly pay the annuity, and a warrant of attorney of even date was also given by the three as a collateral security; and it was thereby declared that the judgment to be entered upon the warrant of attorney should be considered as a further security to D.; and A. and B. afterwards became bankrupts; it was held that D. might prove against the estate of A. and B. for the value of the annuity, and that the annuity was not merged in the judgment.⁵ A contingent annuity, granted by the bankrupt to C. D. in case she survived A. B., may be proved before the happening of the contingency, under the 54th section of 6 Geo. 4, c. 16.⁶ So, an annuity granted for a certain period, though charged

¹ Ex parte Scholes, 1 M. D. & D. 384.

² Ex parte Farnish, 1 M. D. & D. 574.

³ Ex parte Bogue, 3 Dea. 314.

⁴ Ex parte Fairman, 3 Dea. 467;

⁵ Ex parte Pennell, 2 M. D. & D. 273.

⁶ Ex parte Vanheythusen, 1 Dea. 360.

upon uncertain annual proceeds, is capable of valuation, and is equally provable under a fiat against the grantor.¹

Where a father, upon his daughter's marriage, wrote to the intended husband as follows: viz.,—"I promise you, until it is convenient to me to do something better for you, to allow to my daughter 100*l.* a year, which you can have as you may require;" this was held to be an annuity for the joint lives of the father and daughter, and provable under a fiat against the father.² Where a bankrupt, previous to his marriage, became bound to trustees in the penal sum of 3000*l.* conditioned for the payment to them by his executors of an annuity of 150*l.*, in case his intended wife should survive him, in trust for her use and benefit, and the bankrupt and his wife were both living; it was held that the trustees could prove for the value of the annuity under the provisions of the 54th section of the 6 Geo. 4, c. 16, although it was not an annuity in possession.³

A mere stipulation for the payment of annual interest for the forbearance of a sum of money, cannot be proved as an annuity; for it is not an annuity in any reasonable sense of the term—neither does it come within the meaning of the statute. An annuity implies, that the principal sum is gone for ever, and is to be satisfied by yearly periodical payments.⁴

Where the annuity creditor has a policy of assurance assigned to him by the bankrupt, to secure the payment of the annuity, he cannot prove, without a sale of the policy.⁵ But, in a subsequent case, where the annuitant effected the policy of insurance on the life of the grantor, though it might be inferred from the circumstances of the case that the premiums paid for the insurance were agreed to be part of the annuity, it was held that the annuity creditor might retain the policy.⁶

Where an annuity creditor applied to prove, and was refused, on the old principle, that the bond was not then forfeited, but it appeared afterwards that the bond was in reality void under the provisions of the annuity act,⁷ and he then petitioned to prove for the sum actually advanced,—Lord Loughborough dismissed the petition, saying that as he had insisted on his security at the date of the commission, it was not the same debt.⁸ But, in a similar case before

¹ *Ex parte Parratt*, 1 Dea. 696.

⁵ *Ex parte Tierney*, Mont. 78.

² *Ex parte Annandale*, 4 D. & C.

⁶ *Ex parte Varnish*, 1 M. D. & D.

511.

514.

³ *Ex parte Broadley*, 2 M. D. & D.

⁷ 17 G. 3, c. 26.

524.

⁸ *Ex parte James*, 5 Ves. 708.

⁴ *Winter v. Mouseley*, 2 B. & A.

806, 807.

Lord Eldon, where the creditor had not insisted on his security, the grantee was permitted to prove the balance remaining due of the money advanced.¹

Where B. purchased an annuity of C. through the agency of the bankrupts, and the consideration money was received by them *as agents* for C., and placed to C.'s account,—it was held, that B. could not prove the consideration paid, unless the grant of the annuity was merely colourable, and contrived by the bankrupts for the purpose of obtaining B.'s money for their own use.²

A deposit of deeds, as a further security for an annuity previously granted, we have seen,³ is not within the provisions of the annuity act, and such deeds, therefore, need not be registered.

Where it appears that annuities have been granted by the bankrupt for an inadequate consideration,—such as having been granted at only five years' purchase for a good life,—though the assignees may not object to the proof, yet a special meeting of the creditors should be called to decide whether the assignee should consent, or not, to admit such proof.⁴

Annuity creditors are not *compelled*, any more than any other creditor, to come under the fiat, but may sue the bankrupt if they choose, and decline to prove. But they cannot sue any surety for the annuity, without proving; nor can they now proceed against the bankrupt (as they could formerly under a deed of covenant for securing⁵ the annuity) after he has obtained his certificate; for, by the 6 Geo. 4, c. 16, s. 55, the certificate is made a discharge from all claims, either of the annuitant or the surety, in respect of the annuity.⁶

Where the annuity is secured on freehold or leasehold property, which is insufficient to satisfy the arrears due, as well as the value of the annuity, an order will be made for the sale of the property on which the annuity is charged; and the grantee will afterwards be allowed to prove for the residue.⁷ But this order cannot be made by the commissioner but only on petition,⁸ when the court will refer it to the commissioner to ascertain, in the first instance, whether

¹ Ex parte Wright, 19 Ves. 255; and see *Shove v. Webb*, 1 T. R. 732. *Walker v. Liscurry*, 6 Esp. 98. Ex parte *Brochliiss*, Buck. 406.

² Ex parte *Shaw*, 2 G. & J. 106.

³ Ante.

⁴ Ex parte *Cator*, 1 Bro. 267.

⁵ *Fletcher v. Bathurst*, 7 Vin. 71, pl. 4. 4 Burr. 2446. *Cotterel v. Hooke*, Doug. 97.

⁶ And see also section 121.

⁷ Ex parte *Key*, 1 Madd. 426.

Ex parte *Slack*, 1 G. & J. 346.

⁸ Re *Delves*, Mont. 492.

the petition has a valid security on the premises, on which the annuity is alleged to be charged.¹

It has been stated, that arrears of an annuity subsequent to the commission are not the subject of proof;² but no authority is cited for this position, which, indeed, does not appear very reasonable in itself. For, as the creditor, in proving for the entire value of the annuity, proves in fact for the *probable*, though at the same time the uncertain, amount of all *future payments*—which payments would, of course, when they fell due, become of themselves *arrears subsequent to the fiat*—it is somewhat inconsistent to shut him out from proof of arrears which are actually due, and in regard to which there can be, therefore, no uncertainty as to the amount.

The 6 Geo. 4, c. 16, provides, also, for the relief of the *surety* for the payment of an annuity by the bankrupt, (which the 49 Geo. 3, c. 121, was deficient in) as well as for the relief of the bankrupt himself from the contingent claims of the surety. For by section 55, (besides declaring it to be unlawful for any person entitled to an annuity granted by the bankrupt to sue any person, who may be a collateral surety for the payment of the annuity, until the annuitant shall have proved under the commission for the value of the annuity) it is enacted, that if the surety after such proof, shall pay the amount so proved, he is discharged from all claims in respect of the annuity; and he is only liable to be sued for the accruing payments, in the event of his failing to pay the sum proved before any payment of the annuity subsequent to the bankruptcy becomes due; nor is he then liable to pay beyond the amount so proved, with interest at 4 per cent. from the time of his receiving notice of such proof, and of the amount thereof. And, after such payment or satisfaction by the surety, he may then stand in the place of the annuitant, in respect of the proof, to the amount of the sum so paid or satisfied; and the certificate of the bankrupt is then declared to be a discharge from all claims of the surety, as well as of the annuitant, in respect of the annuity. The surety is also entitled to credit in account with the annuitant, for any dividend which the latter may have received, before he can be called upon to pay the whole sum proved by the annuitant under the fiat.³

¹ Ex parte *Stuart*, 2 M. D. & D. 540.

² 1 G. & J. 346, note (a).
Eden's B. L. 115.

³ This section has been decided to have a retrospective operation, and to apply to annuities granted before the 6 G. 4, c. 16, although

But neither the value, nor the instalments of an annuity, for the payment of which a surety expressly covenants in case of the default of the grantor, are proveable under a fiat against the surety, where the instalments do not become due until after the bankruptcy of the surety;¹ for the surety does not contract a debt until default made, either under the 54th or 56th clauses of the 6 Geo. 4, c. 16.

And where an annuity, granted by A. to B., was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and also by a judgment entered up against A. & C.; and the annuity remained unpaid from January, 1823, A. having left the country; and in February, 1824, C. became bankrupt, and afterwards obtained his certificate; it was held that neither the value of the annuity, nor the sum due on the judgment, was proveable under C.'s commission.²

It may still be a doubtful point, when the annuity creditor, after proving the value of the annuity, and receiving all the dividends he can upon such proof, comes upon the surety for the deficiency, after the bankrupt has obtained his certificate,—whether, in such a case, the certificate would discharge the bankrupt from the claims of the surety. For, if the annuity creditor chooses to avail himself to the extent of his proof, without giving any notice to the surety, or making any claim against him until after a final dividend is declared, the surety would have no opportunity of proving under the fiat. It might indeed be held, that, in order to acquit himself, as against the annuity creditor, and to entitle himself to any claim against the bankrupt, he is bound to take immediate notice of the annuitant's proof, and to pay the amount so proved; for, by the above section, the annuitant is not compelled to give the surety notice of the amount of the proof, except indeed so far as to entitle himself to interest from the surety upon the sum proved.³

Where one of three co-sureties paid money on account of the annuity, after the bankruptcy of a co-surety, it was held that the latter was liable to an action for contribution, though he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the

the grantor became bankrupt before that act began to operate. *Bell v. Bilton*, 4 Bing. 615.

¹ *Thompson v. Thompson*, 2 Scott, 266. 2 Bing. N. C. 168. Ex parte *Marks*, 3 Dea. 133. Ex parte *Thompson*, 2 D. & C. 126.

² *Johnson v. Compton*, 4 Sim. 37.

³ And see *Watkins v. Flanagan*, 1 Bing. 413. 1 G. & J. 199 3 B. & A. 186. *Welsh v. Welsh*, 4 M. & S. 333. *Freeman v. Burgess*, 4 Bing. 416.

commission against his co-surety.¹ But it was held in this case, that the bankrupt could not, *at law*, be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment.

SECTION XII.

Apprentices, Clerks, Servants, and Children.

Where a sum of money had been paid as a premium with an apprentice, and his master became bankrupt, it was the practice of the commissioners, before the 6 Geo. 4, c. 16, to recommend it to the creditors to allow the apprentice a gross sum out of the estate, for the purpose of binding him to another master, instead of obliging the apprentice to come in as a creditor under the commission.² But this proceeding, though equitable and just in itself, was only matter of indulgence, and not of right; for, if it was objected to, the court could, in strictness, only order the apprentice to be admitted as a creditor.³ The bankruptcy, also, of the master was held no discharge, in law, of the apprentice's indentures.⁴ But now by the 49th section of the above statute, it is declared that the commission shall enure as a complete discharge of the indentures of an apprentice; and, if any sum shall have been paid as an apprentice fee, the commissioners may, upon proof thereof, order any sum to be paid to or for the use of the apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the premium which has been paid, and to the time that the apprentice shall have resided with the bankrupt.

Although the execution of the indentures has not taken place from mere inattention, yet if the agreement for the apprenticeship is concluded, and the apprentice fee is paid, and the apprentice is actually serving under the concluded agreement, the father will be entitled to a return of part of the premium.⁵

With respect to *servants*, also, a power is given to the commissioner by the 5 & 6 Vict. c. 122, s. 28, to order three

¹ *Brown v. Lee*, 6 B. & C. 689.
And see post, 669.

² *Barwell v. Ward*, 1 Atk. 261.

³ *Ex parte Sandby*, 1 Atk. 149.

⁴ *Buckington v. Shepton*, 8 Mod. 235. Str. 582. 2 Ld. Raym. 1352.

⁵ *Ex parte Haynes*, 2 G. & J. 122.

months' wages, or salary, to be paid to any servant, or clerk, of the bankrupt, not exceeding 30*l.*; but if more than this is due, then the clerk, or servant, must prove for the difference.¹ But this payment is not to be made out of the first monies got in, but as soon as there is a sufficient fund for the purpose, after paying the expenses of working the fiat.² And if the servant has so misconducted himself, that he could recover nothing for his services in an action at law, he would of course be entitled to no payment under the above section;³ nor is he entitled to any such payment, if his wages are not due at the time of the bankruptcy.³

It is not requisite to prove a hiring for a year certain, to bring the party within the definition of a *servant*; but it must be something more than a mere hiring by the week.⁴ A person engaged as a *traveller*, at an annual salary, is a *servant*, or *clerk*, within the meaning of the above section.⁵ So, the mate of a vessel, although one of the owners, yet if he is hired by the master at certain wages, is a *servant* within the meaning of the above section.⁶ And now, by 5 & 6 Vict. c. 122, s. 29, any *labourer* or *workman* of the bankrupt is entitled to be paid his wages out of the estate, not exceeding 40*s.*

A *child* living with the father, and earning money for itself, may be admitted as a creditor under the fiat against the father, if he has received that money to the child's use. But Lord Hardwicke said he was under some difficulty in making such an order, for the sake of the precedent; as it might be dangerous in London to lay it down as a general rule, that every child who earns money whilst living with his father, which the latter receives, may claim it as a debt in the event of his father's bankruptcy; for a father frequently, as was remarked in that case, sends out his son to work as a journeyman, and his earnings then are supposed to belong to the father.⁷ And where a son had lived with his father seven years as a clerk, receiving only board and lodging, and there was no actual contract for wages—though the father swore it was always his intention to pay him something for his ser-

¹ Labourers and workmen were held not to be within the 6 G. 4, c. 16, s. 48. *Ex parte Grellier*, Mont. 264. *Ex parte Crawford*, Mont. 270.

² *Ex parte Hampson*, 2 M. D. & D. 462.

³ *Thomas v. Williams*, 1 Ad. & E. 685.

⁴ *Ex parte Collier*, 4 D. & C. 520.

⁵ *Ex parte Neal*, Mont. & M. 194.

⁶ *Ex parte Homborg*, 2 M. D. & D. 642.

⁷ *Ex parte Macklin*, 2 Ves. 675. This case arose out of the bankruptcy of Macklin, the comedian, and the petitioner was his daughter, whose earnings, as an actress, he had received from the managers of different theatres.

vices, and the assignees did not object—yet Lord Eldon, though he lamented the hardness of the case, said, that as there was in reality *no contract* for wages, he could make no order for the son to prove.¹

Debts owing by the bankrupt to children, or other relations, are always watched in bankruptcy with great suspicion—with greater, perhaps, than the justice of the case frequently requires; since a man in pecuniary distress, as has been well observed, is more likely to apply to his relations, than to strangers, for that assistance of which he is in want.²

SECTION XIII.

Awards.

An award, if made before bankruptcy, creates such a debt as may be proved under the fiat. Therefore, where a man was taken upon an attachment for not performing an award, and afterwards became bankrupt and obtained his certificate, he was ordered on motion to be discharged. For, though an attachment is in the nature of a contempt, which is not purged by bankruptcy, yet an action of debt will lie on an award; and the bankrupt ought not to be arrested, prosecuted, or impleaded³ for any debt due before the bankruptcy.

But where proof was admitted upon an award made *after* the bankruptcy, the proof was in that case ordered to be expunged.⁴

SECTION XIV.

Bonds.

A creditor by bond is entitled to prove his demand against all the parties to it, and to receive dividends upon the whole sum from each estate, provided he does not receive more than 20s. in the pound. If he does receive more, he is accountable for the surplus. And if he has received any part of the debt before he applies to prove, he can then only prove and receive dividends for the residue due to him.⁵

¹ Ex parte *Glover*, 1 Mont. Dig. 165.

² Per Lord Eldon, 1 Ves. & B. 48.

³ *Baker's case*, 2 Str. 1152.

⁴ Ex parte *Kemshead*, 1 Rose, 149.

⁵ Ex parte *Wildman*, 1 Atk. 109. 2 Ves. 113.

A bond, though not strictly assignable at law, may nevertheless be proved by the assignee under a fiat against the obligor; but the assignor must in this case join with the assignee in the usual deposition for the proof of debts; namely, that he hath not received the debt, or any part thereof, or any security or satisfaction for the same.¹

If a bond be payable generally on demand, and interest has been paid upon it, though no demand has actually been made, it may still be proved under the fiat.² But, where a bond was given by the bankrupt, for the payment of the interest on the principal debt by half yearly payments on Lady Day and Michaelmas, or *within twenty days next after demand*, and for payment of the principal to the *executors* of the obligee,—and no demand had been ever made for the interest,—the bond was in this case held not to be forfeited, and the obligee incapable of proving it under the commission.³

A bond to *replace stock* by a given day, if it is forfeited before the bankruptcy, is proveable.⁴ And, where such a bond was also conditioned for making good the dividends payable in the meantime, and the obligor became a bankrupt after the day mentioned in the condition,—Lord Eldon admitted proof for the amount of the dividends before the bankruptcy, and also for the value of the stock at the date of the commission,⁵ by analogy to the case of annuities. A somewhat different mode of calculation, however, has been adopted by the Court of King's Bench. For where the bankrupts had covenanted to replace stock by four instalments, and one was replaced when due, two others had become due before the issuing of the commission, and the day for replacing the remaining instalment had not then arrived; that court decided, that the creditor might prove for the value of the two instalments which ought to have been transferred on the days passed before the bankruptcy, to be calculated at the market price of the stock on those days respectively; and that the value of the remaining instalment (which was not then due) was to be calculated at the price on the day of issuing the commission, with a rebate for the interval, between that day and the day appointed for replacing the last instalment.⁶ Where a bankrupt before his bankruptcy, on a loan of stock, gave a bond to re-transfer the principal within three years,

¹ C. B. L. 146.

² Ex parte *Sparting*, C. B. L. 146.

³ *Winter v. Mousely*, 2 B. & A. 802.

⁴ Ex parte *Leitch*, C. B. L. 149.

⁵ Ex parte *Day*, 7 Ves. 301; and see *Shepherd v. Johnson*, 2 East, 211.

⁶ *Parker v. Ramsbottom*, 3 B. & C. 257.

and to pay the amount of the dividends in the mean time, and also agreed to convey a real estate as a security, and no re-transfer was made, nor any dividends paid,—it was held, that the estate should be sold, the amount of the dividends paid out of the produce, and that other stock should be purchased with the residue, and if not sufficient to re-purchase the whole principal stock, that proof should be made for the deficiency; and the assignees were held not entitled to have three years to re-transfer the stock.¹

A *voluntary* bond, given without a consideration, may be proved, not for the purpose of receiving a dividend with the other creditors, but for payment out of the surplus.² But the surplus of a separate estate must be carried to a deficient joint estate before any payment can be made on such a bond.³ And the creditor on such a bond cannot vote for assignees.⁴ But a bond, given for the arrears of a voluntary bond, is held to be a bond for a valuable consideration, and, as such, may be proved for the purpose of receiving a dividend.⁵

With respect to *bail-bonds*, it has been determined, that, where a defendant gave a bail-bond to the sheriff, which was forfeited *before* his bankruptcy by non-appearance, and an action was brought against him afterwards upon the bond, the debt on the bond was barred, whether the judgment was signed before, or after the bankrupt obtained his certificate, and was, therefore, proveable under the commission—on the principle, that when the penalty was forfeited the debt became due, though execution could not be taken out for more than the damages⁶—and that the substance of the action on the bail-bond was the same as that on the original debt. But if the bail-bond was not forfeited until *after* the bankruptcy of the defendant, the bond has been held, in that case, not proveable under the commission, as it was then considered a new and distinct cause of action.⁷ So, where a bankrupt before his bankruptcy, upon being sued by a creditor, had given a bond under the 4 Geo. 3, c. 33, (the bankrupt being a member of parliament) for the payment of such sum as should be recovered in the action, together with the costs; and *after* his bankruptcy, but before his certificate, judgment was obtained in such action,—it was held, that a

¹ *Ex parte Fisher*, 3 Mad. 159, Buck. 188.

² *Gardiner's Assignees, v. Shannon*, 2 Sch. & Lef. 228.

³ *Ex parte Spurrier*, Mont. 246.

⁴ *Ex parte Gladdir*, Mont. 495, note.

⁵ *Gillham v. Lock*, 9 Ves. 612,

And see *Meggison v. Foster*, 2 Younge & C. 336.

⁶ *Bonteflour v. Coates*, Cowp. 25, *Dimsdale v. Eames*, 2 B. & B. 8.

⁴ Moore, 350. *Coulson v. Hammon*, 2 B. & C. 626.

⁷ *Cockerill v. Owston*, 1 Burr.

436.

bond of this description, being analogous to a bail-bond, could not under these circumstances be proved under the commission.¹ But now, it is apprehended, though a bail-bond is not forfeited until after the bankruptcy of the defendant, it may nevertheless, under the 56th section of the statute, be proved under the fiat, like any other contingent debt after the happening of the contingency.

As to the right of the bail themselves to prove under a commission against their principal, see post, title "*Sureties*."

Where a sheriff seized a defendant's goods, against whom a commission of bankruptcy having subsequently issued, and the goods being claimed by the assignees, the sheriff delivered up the goods to them, taking from them a joint bond of indemnity against all loss which he might sustain by quitting possession and returning *nulla bona*; upon which the execution creditor brought an action against the sheriff for a false return, and recovered a verdict for 800*l.*; and one of the obligors in the bond became bankrupt before the sheriff had paid the amount of the verdict,—it was held that the sheriff could not prove under the bond, having sustained no actual pecuniary loss, until after the issuing of the fiat.²

Where A. and B. entered into a joint and several bond to C. D. and E., and C. delivered the bond to A. (who was her son) for safe custody, and, after for some time receiving the interest from A., she and D., another of the obligees, died, and afterwards B., one of the obligors, also died, when his executors and A. made an arrangement together without the privity of E., the surviving obligee, and erased the name and seal of B. from the bond; it was held that this did not invalidate the bond as against A., and that in his bankruptcy the surviving obligee might prove for the amount of the principal and interest due.³

A bond to secure all monies which a party may draw out from, or owe to a bank, does not cover sums paid by the bank on such unstamped drafts as are declared illegal by the provisions of the Stamp Act, 55 Geo. 3, c. 184, s. 13.⁴

Where a bankrupt, previous to his marriage, entered into a bond that in case his wife should survive him, and should within two months after his death release her dower, his heirs or executors should within three months after his death pay to her 2,000*l.*; and the wife survived the bankrupt, but did not, within two months after his death, release her dower,

¹ *Jameson v. Campbell*, 5 B. & A. 250. 1 Bing. 320. 8 Moore, 281.

² *Ex parte Marshall*, 3 D. & C. 120.

³ *Ex parte Smith*, 3 M. D. & D. 378.

⁴ *Swan v. Bank of Scotland*, 1 Dea. 746.

although she was always ready and willing to do so,—it was held that the bond was not proveable, either under the first or last part of the 56th section of the Bankrupt Act, inasmuch as the contingency had not happened, and no value could be set upon it.¹

So, where an assignee of a lease gave a bond to the lessee, for payment of rent and performance of the covenants with the lessor, and became bankrupt after the bond had become forfeited by the non-payment of the rent,—the bond was held incapable of valuation, and, consequently not proveable under the commission. And though the lessee might be liable for damages to the lessor, by reason of the non-payment of the rent before the bankruptcy, yet these could not have been proved, unless they were actually paid by the lessee to the lessor.²

And see further as to bond creditors, "*Marriage Articles*," "*Annuities*," "*Contingent Debts*," "*Insurance*," "*Sureties*."

SECTION XV.

Bills of Exchange and Promissory Notes, and herein of Cross Paper Demands.

The holder of a bill of exchange is, like the creditor on the bond, entitled to prove the amount of it against all the parties whom he might proceed against at law, whether drawer, acceptor, or indorser; and he may receive a dividend from the estate of each on the amount, provided he does not in the whole receive more than 20s. in the pound.³ He should state, however, in his deposition, the consideration which he gave for the bill.⁴ But it makes no difference, whether the bill is an *accommodation* bill, or whether the holder has given less than the amount for it; except that in this last case, as against the estate of the person *from whom he received it*, he can only prove the exact sum due to him, and is not entitled to more than 20s. in the pound upon the consideration which he gave for it.⁵ Thus, where the bankrupt delivers bills with his name upon them to A., for goods furnished by A. to

¹ Ex parte *Davies*, 1 Dea. 115.

² *Taylor v. Young*, 3 B. & A. 521. 8 Taunt. 318. 2 Moore, 326.

³ *English v. Darley*, 2 B. & P.

⁴ Ex parte *Maberly*, 2 M. & A. 23.

⁵ Ex parte *King*, C. B. L. 156.

Ex parte *Crossley*. Ex parte *Downward*, Ibid. 157. 3 Bro. 237. Ex

parte *Bloxham*, 6 Ves. 449. 600.

8 Ves. 55. Ex parte *Earle*, 5 Ves.

833.

B., and such goods are afterwards partly paid for by B., A. can only prove for the sum remaining due for the goods, and not for the full amount of the bills. But the case would be otherwise, if the bills had been *delivered by B. to A.*, without any communication between the bankrupt and A.,—for then there would have been no immediate contract between the bankrupt and A., and the bankrupt would be consequently answerable to the full amount of the bills,¹ provided A. did not receive dividends beyond the amount of his debt.² So, where a bill is given by the purchaser for the price of goods bought, and the goods are afterwards paid for in part, the seller can only prove under a fiat against the purchaser for the balance remaining due to him, and not for the whole amount of the bill; for the bill, so long as it remains in the hands of the seller, represents only such part of the price of the goods as remains unsatisfied.³

Proof before or after part payment.] There is a distinction, also, in every case where the holder of a bill applies to prove it, *after* receiving part of the amount,—and where he applies to prove, *before* any payment or composition upon it. If, at the time of proving, he *has* received a part of it, he can then only prove for so much as remains due; for, of course, he could not in such a case swear, that the whole amount was due.⁴ And when a dividend is declared under another fiat, under which the holder has already proved the bill,—though the dividend has not been actually received, yet the amount of it must be deducted from the bill, before it can be proved.⁵ Nor does it vary this rule, that the holder had been permitted to enter a claim for the full amount of the bill, *previously* to the declaration of the dividend under the other fiat, and had also, previously to such declaration, made an affidavit in proof of his debt, to be laid before the commissioner at the next meeting.⁶ And where goods, in which the bankrupts were jointly interested with A. B., were pledged with a creditor to secure the payment of an acceptance of the bankrupts', and part of the proceeds were received by the creditor before he applied to prove; it was held that he must deduct the amount so received before he could prove on the acceptance; though it would have been different, if the goods had belonged to A. B.

¹ Ex parte Reader, Buck. 381.
S.P. ex parte Bonham, 3 D. & C. 285.

² Ex parte Philipps, 1 M.D. & D.
232.

³ Ibid.

⁴ Cooper v. Pepys, 1 Atk. 107.

⁵ Ex parte Leers, 6 Ves. 644. Ex parte Todd, 2 Rose, 202, note. Ex parte Moult, 1 D. & C. 44.

⁶ Ex parte Bank of Scotland, 2 Rose, 197. 19 Ves. 310. Ex parte Worrall, 1 Cox, 309.

alone.¹ Where, however, the commissioners had *improperly rejected a proof*, and admitted the holder only to claim; and it was afterwards decided upon appeal, that the proof ought to have been received—it was held that, though generally all payments made previously to the proof must be deducted, yet, in this case the proof would relate back to the time of the claim, and that any sums partially paid after that time were to be considered as payments subsequent to the proof.²

But if the holder, *after* having proved for the amount of the bill, receives a part from any of the persons liable to pay it, he is still entitled to a dividend upon the whole amount,³ provided it does not exceed 20s. in the pound upon such part as remains due. Under very special circumstances, however, the holder of a bill (notwithstanding part payment from another party) has been allowed to prove for the whole amount against the *acceptor*, and to stand as a trustee for such other party, as to all he receives above the real balance due to himself upon it. As where A., being an indorsee of B. and C.'s acceptances for 1,364*l.*, sued out a separate commission against B., but had previously by payments received from D. (for whom he had discounted the bills) reduced his debt to 420*l.*,—it was held in this case, that A. might prove for the whole amount of the acceptances, standing as a trustee for D. for all above 420*l.* Lord Eldon, in deciding this case, took into consideration that A. (being the petitioning creditor) was the *only joint creditor who could* come in with the separate creditors, and receive dividends with them—and that, as D. could not therefore prove so as to receive any dividend, and the bills would be discharged as against the bankrupt by the operation of the certificate, it was but just that D. should have what benefit he could derive from the proof of A.⁴

And where bills amounting to 1,320*l.* were delivered by the drawer to the creditor as collateral security for a debt of 4,000*l.*, and the drawer and acceptor became bankrupts, but the estate of the acceptor proved solvent, the creditor was held entitled to receive 20s. in the pound on the bills against the estate of the acceptor, and also prove the debt of 4,000*l.*, and receive dividends on that amount in li-

¹ Ex parte Prescott, 4 D. & C. 23.

² In re Gibson and Johnson, cit. per Ld. E. 2 Rose, 201.

³ Ex parte Wildman, 1 Atk. 109. 2 Ves. 113. 2 B. & P. 62. Formerly

this was holden otherwise. See ex parte Lefebvre, 2 P. Wms. 407.

⁴ Ex parte De Tastet, 1 Rose, 10; and see ex parte Martin, 2 Rose, 87.

quidation of the remaining portion of his debt under the commission against the drawer.¹

Bills not due.] As all debts payable at a future day, whether the creditor holds a written security or not, are now made proveable² under the commission, a bill or note (though not yet due) may of course be proved,—and the holder will be entitled to receive a dividend thereon generally with the other creditors, deducting only a rebate of interest for what he shall receive, at the rate of 5*l.* per cent., to be computed from the declaration of a dividend, up to the time when the debt would become payable. And the holder of a bill not due may prove the amount against the drawer, though it is at the time uncertain whether the acceptor will pay it or not, when it becomes due.³ For the *drawing* of a bill constitutes as much as a *debitum in presenti* from the drawer, as the acceptance of it does with regard to the acceptor.⁴

Upon the same principle a promissory note payable three months after notice is proveable, though the maker becomes bankrupt before any notice is given.⁵

Objections to proof.] Whatever would be a valid defence to an action on a bill or note, is a valid objection to the proof of it under a fiat. Thus, the *illegality* of the *consideration*, for which the bill or note was given, will prevent the holder from proving it in all cases, where he was cognizant of the illegality at the time he took the bill or note; and in some cases also—as where the legislature has declared the instrument to be absolutely void—whether he had knowledge of the illegality or not.⁶

But although a party may obtain the acceptance of another person by fraud, yet a subsequent holder who is ignorant of the fraud, may prove for that amount against the acceptor.⁷

So, where the *statute of limitations* would prevent the holder from recovering at law, he is equally prevented from proving on the bill, or note.⁸ The payment of a dividend by

¹ Ex parte *Sammon*, 1 D. & C. 564.

² Section 51. The 7 G. 1, c. 31, was the first statute that made bills and notes, not due, proveable under a commission.

³ *Starey v. Barns*, 7 East, 435.

⁴ *Macarthy v. Barrow*, 2 Str. 949. 3 Wils. 16. 2 Barnard, 251, 5. 7 East, 437 n. Dub. tamen Lord Ellenborough, 7 East, 440.

⁵ Ex parte *Edgar*, 2 G. & J. 2. *Clayton v. Gosling*, 5 B. & C. 360. Contrà ex parte *Downman*, 2 G. & J. 85, but reversed, *ibid.* 241.

⁶ And see post. “Illegal and void Debts.”

⁷ Ex parte *Samuel*, 2 M. D. & D. 384.

⁸ Ex parte *Dewdney*, 15 Ves. 479. Ex parte *Seaman*, *ibid.* Ex parte *Roffey*, 2 Rose, 245.

the assignees of one of two makers of a joint promissory note, has been held to prevent the other maker from availing himself of the statute.¹ But this doctrine has been since doubted, and has been refused to be extended to a case, where the indorsee had proved for an antecedent debt, and had merely exhibited the note as a security,² or where the dividend was paid, after the statute had already run.³ But a payment by one of two joint makers of a promissory note, of any interest due upon it, will prevent the other joint maker from availing himself of the statute.⁴ So, a bill of exchange given by a bankrupt, to a creditor, in consideration of an advance of money made more than six years before the bill was given, is a sufficient acknowledgement of the debt, so as to take the case out of the statute of limitations.⁵

A bill, in payment of which another bill has been delivered to the holder, cannot in general be proved; but if the former bill is permitted to remain with the holder, then if the latter bill is not paid, there is no objection to the proof of the former.⁶

Where the bankrupts gave a joint and several promissory note for 2,000*l.* to secure advances by their bankers, and when they were indebted to them 1,957*l.*, one of the bankrupts mortgaged certain property to them to secure that sum, and all such further sums as might be advanced, to the extent of 3,000*l.*, and the amount of the debt due to the bankers was 4,365*l.*; it was held that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of their debt.⁷ It is no objection to the proof against the drawer, that the holder obtained the bill from the acceptor, if there is no suspicion of fraud.⁸

If the holder enter into a *composition* with the *acceptor* or *maker* of a bill or note, or agree to give him time for payment of it, without the previous assent of the other parties, he thereby discharges all those other parties.⁹ But where a note is made by one person as principal, and the others as *sureties*, then the compounding with one of the *sureties* will

¹ *Jackson v. Fairbank*, 2 H. B. 340.

² *Brandram v. Wharton*, 1 B. & A. 463; and see *Athyns v. Tredgold*, 2 B. & C. 23.

³ *Ibid.*

⁴ *Ex parte Woodward*, 3 Dea. 290.

⁵ *Ex parte Wilson*, 1 M. D. & D. 586.

⁶ *Ex parte Barclay*, 7 Ves. 957.

⁷ *Ex parte Bate*, 3 Dea. 358.

⁸ *Ex parte Gill*, 3 Dea. 288.

⁹ *Ex parte Smith*, 3 Bro. 1 C. B. L. 171. *Ex parte Wilson*, 11 Ves. 410. *English v. Darley*, 2 B. & P. 61. *Anderson v. George*, 1 Burr. 533. *Kellock v. Robinson*, 2 Str. 745. *Tindal v. Brown*, 1 T. R. 167.

not have the effect of discharging the principal, or indeed any of the other sureties; for the discharge of the surety is very different¹ from the discharge of the principal.

The same *laches*, too, of the holder, which would discharge any other party at law if he had continued solvent, will equally preclude the holder from proving under a commission against such party. Thus, if the holder neglect to give notice² of the dishonour of a bill to the drawer, and the indorsers, or do not at least use due diligence in attempting to give notice,³ they are thereby respectively discharged. If, however, the acceptor has no effects of the drawer's in his hands, in this case, the *drawer* will not be discharged, as he cannot then be injured by the want of notice;⁴ but the *indorser* in such a case is still entitled to notice.⁵ And an offer of composition made by the acceptor to the holder, in the presence of the drawer, accompanied by a declaration that the acceptor could not provide for the bill when due, does not dispense with the necessity of presenting the bill when due, and giving notice of its dishonour to the drawer, although the drawer urges the holder to agree to the composition.⁶ The *onus* of proving the bill to be an accommodation bill, so as to dispense with the giving notice, is thrown upon the party contending that it is so.⁷ And if the *holder* has not given notice *himself* to the drawer, he cannot avail himself of notice given by any other person.⁸ The bankruptcy or insolvency of the acceptor, it has been determined, does not excuse the holder from giving notice to the drawer, or any other party entitled to notice.⁹ But it was held by Lord Thurlow, that if the *drawer* or *indorser*, is a bankrupt at the time of the dishonour of the bill, it was unnecessary to give notice, either to him or his assignees.¹⁰ In a more recent case, however, before the court of King's Bench, it was decided, that where the house of the bankrupt drawer is kept open by an agent of his assignees,

¹ Ex parte Gifford, 6 Ves. 805.

² Goodal v. Dolley, 1 T. R. 712.
Tindal v. Brown, supra. Gee v. Brown, 2 Str. 792. Blissard v. Hurst, 5 Burr. 2670. Hartley v. Case, 4 B. & C. 339. Walter v. Haynes, 1 Ryan & M. 149. Mann v. Moors, ibid. 249.

³ Burridge v. Burgis, 3 Camp. 262. Crosse v. Smith, 1 M. & S. 545. Goldsmith v. Bland, Bay. on Bills, 224.

⁴ Ex parte Holden, C. B. L. 167. Bickerdike v. Bollman, 1 T. R. 405.

Rogers v. Stevens, 2 T. R. 713. Walcyn v. St. Quintin, 1 Bos. & P. 652; and see 13 East, 214. 4 Camp. 285. 1 Star. 116.

⁵ Wilks v. Jacks, Peake, 202.

⁶ Ex parte Bignold, 1 Dea. 712.

⁷ Ex parte Heath, 2 Ves. & B. 240.

⁸ Ex parte Barclay, 7 Ves. 597.

⁹ Esdaile v. Sowerby, 11 East, 117. Thackray v. Blackett, 3 Camp. 165. 11 Ves. 412. 2 B. & P. 279. Bayl. 115. Chitt. 210.

¹⁰ Ex parte Smith, 3 Bro. 1.

there notice is essential, and that a neglect to give it will bar the holder's right to prove against the drawer's estate.¹ Lord Thurlow's decision was not cited in argument in the last case; but the necessity of notice under these circumstances has been in some measure recognised in a case before Lord Eldon, in which he decided that notice of a dishonoured bill given to a bankrupt, as drawer, *before the choice of assignees*, was sufficient notice to entitle the holder to prove.²

And it has been since held, that where the drawer or indorser becomes bankrupt, notice of dishonour, if occurring before the choice of assignees, must be given to the bankrupt, and if after such choice, then to the assignees.³

If a bill be made payable to a *fictitious* payee, with the knowledge of the acceptor, it is considered in effect as payable to the bearer; and a *bonâ fide* holder of it, for a valuable consideration, may prove it under a fiat against the indorser, or any other party, who knew, at the time he put his name to it, that the payee was a fictitious person.⁴ But where the acceptor, at the time of his acceptance, was ignorant that the payee was a fictitious person, the bill in such a case has been held to be void.⁵

The same objections, also, as to the *form* of the bill, which may be urged with effect in an action, apply to the proof of it under a fiat. Thus, a bill or note is bad, if the sum for which it is given is payable on a *contingency*,—or if, in the case of a note, the promise to pay is a *conditional*, and not an absolute, promise.⁶ A promissory note, therefore, given to pay a sum, “when the circumstances of the maker will admit without detriment to himself or family,” does not create a debt proveable under a fiat.⁷ So, a promissory note made payable “in cash, or Bank of England notes,” has been for the same reason held bad for uncertainty; and the holder of several notes of this description, who received them from an intermediate person, was not allowed to prove under a commission against the maker, either upon the notes,⁸ or as for money had and received.⁹

¹ *Rhode v. Proctor*, 4 B. & C. 517. And see *ex parte Rhode*, Mont. & M. 430, where the decision of the King's Bench was confirmed by Lord Lyndhurst.

² *Ex parte Moline*, 19 Ves. 216.

³ *Ex parte Chapple*, 3 Dea. 218. *Ex parte Johnson*, 3 Dea. & C. 334.

⁴ *Ex parte Clarke*, 3 Bro. 238. *Ex parte Allen*, C. B. L. 172.; and see *Tatlock v. Harris*, 3 T. R. 174. *Vare v. Lewis*, *ibid.* 182. *Mines v. Gib-*

son, *ibid.* 481. *Collis v. Emet*, 1 H. B. 313. *Gibson v. Minet*, *ibid.* 569. *Gibson v. Hunter*, 2 H. B. 288.

⁵ *Bennet v. Farnell*, 1 Camp. 130. 180. c.

⁶ *Smith v. Boheme*, *cit.* 2 Ld. Raym. 1362, 1396. *Roberts v. Peake*, Barr. 323, &c.; and see Bayl. 8.

⁷ *Ex parte Tootell*, 4 Ves. 372.

⁸ *Ex parte Imeson*, 2 Rose, 225.

⁹ *Ex parte Davison*, Buck. 31.

If the bill or note has not a proper *stamp* affixed to it,—this, also, is another objection, which is as valid in Bankruptcy, as at law.¹ But though a bill be void for want of a proper stamp, proof may still be made for the original consideration.²

Where the holder of a bill accepted by the bankrupt, for the payment of which the holder also held a security, transferred their security to a third person, who proved for the amount under the fiat; it was held that this did not prevent the right of the bill-holder to prove, also, on the bills; though it might be a question for future consideration, whether he would be entitled to receive dividends on such proof.³

Where a bill has been *lost* by the holder, he may nevertheless be permitted to prove it, upon giving an ample indemnity to the satisfaction of the commissioner.⁴

Bills not indorsed.] Where a bill is taken *without the indorsement* of the party from whom the holder receives it, the bill itself cannot be proved under a fiat against that party; for no debt is proveable on a bill, but what arises on the face of it.⁵ And, though there is a private mark on the bill, and the party admit, that upon all bills transferred by him without indorsement, on which he made that mark, he considered himself as much liable as if he had indorsed them⁶—or though the party write over the last indorsement, “Pay B. or order,”—the rule is the same; for in neither of these cases does the party contract any legal obligation upon the face of the bill.⁷ So, where there was even an *engagement in writing* from the party, to warrant the payment of the bill in like manner as if he had indorsed it, which engagement came into the hands of the holder for a valuable consideration,—yet this circumstance has been held not to entitle the holder to prove the bill against the party who had ac-

These two last cases, it must be confessed, carry the doctrine of *uncertainty*, in the construction of the promise in a note, to a point somewhat bordering on the extreme;—and more especially at a time when Bank of England notes were declared by the legislature to be a legal tender, and formed the chief circulating medium of the country.

¹ *Ex parte Manners*, 1 Rose, 68.

² *Alves v. Hodgson*, 7 T. R. 241.

Ruff v. Webb, 1 Esp. 129. *Brown v. Watts*, 1 Taunt. 353. *Wilson v. Vyse*, 4 Taunt. 289.

³ *Re Barham*, 1 M. D. & D. 179.

⁴ *Ex parte Greenwood*, 6 Ves. 812.

⁵ *Ex parte Roberts*, 2 Cox, 171; and see *Fenn v. Harrison*, 3 T. R. 759. *Eyds v. Clarke*, 1 Esp. 447.

⁶ *Ex parte Shuttleworth*, 3 Ves. 368.

⁷ *Ex parte Isbester*, 1 Rose, 20. *Vincent v. Hurlock*, 7 Camp. 422.

engaged to pay it.¹ And now, by the 1 & 2 Geo. 4, c. 78, s. 2, all *inland* bills must be accepted by *writing upon the bill*; and when a bill is accepted payable at a particular place, this is to be deemed a GENERAL acceptance; and presentment at that place need not be proved, unless it is expressed in the acceptance to be *only* payable at that place.

Where A. sent B., his agent, to America, to purchase cotton wool, and authorised him to draw bills on A., and to sell and discount the same, and with the proceeds to pay for the cotton; and B. accordingly drew a bill on A. for 3,000*l.* in favour of R., who discounted it for B., and afterwards negotiated it to third persons; and B. applied the proceeds in payment of the cotton, which was shipped off by B. to A. at Liverpool, but before the arrival of the cotton, or the presentation of the bill for acceptance, A. became bankrupt; and the cotton was sold by the assignees for the benefit of the estate; it was held, that these circumstances did not amount to a virtual acceptance of the bill by A., and that a subsequent indorsee for value could not prove the amount of it against A.'s estate.²

When a bill, which has been taken without the indorsement of the bankrupt, is to be considered a *purchase*, and when a *pledge*, will depend on the circumstances of the case, and the nature of the agreement between the parties. An exchange of paper between two persons, where the bills are of the same amount, has been considered to be a *purchase* by each party of the bills of the other. As where G. accepted a bill for J. and W., and in exchange they delivered to him at the *same time* a bill to the *same amount* drawn and accepted by other parties, but not indorsed by J. and W.,—Lord Eldon held this to be a *purchase* on the part of G. of the last-mentioned bill, that being the consideration for the acceptance given by him to J. and W.; and though G. had paid his acceptance, and the bill he received was dishonoured, yet he was not permitted to prove the amount of such bill under a commission against J. and W.³ If the bill is *discounted*⁴ by

¹ Ex parte *Harrison*, 2 Bro. 614. Ex parte *Bell*, 1 Mont. 192. In re *Barrington*, Sch. & Lef. 112; and see post.

² Ex parte *Bolton*, 2 Dea. 537.

³ Ex parte *Hustler*, 1 G. & J. 9.

⁴ There is an inaccuracy in several of the books, (1 Rose, 23. Buck. 115, n.) as to the distinction taken between a transfer with, and without, indorsement,—in denomi-

nating the one transaction "*as a sale*," and the other "*as a discount*,"—a *discount* being in fact, nothing more than advancing the money secured by the bill (whether indorsed or not) *minus* the interest; and the person so advancing the money, if he does not take the indorsement of the party, is in reality the *purchaser* of the bill.

the taker, it is then also considered as a purchase; and, whenever such a bill is taken as a purchase, it liquidates the debt due from the person transferring it to the full amount of the bill,¹ and, consequently, the debt cannot be proved under a fiat against such person.

Where, however, a bill without indorsement is taken as a security for an *antecedent debt*, and there is no express agreement that it is taken in *payment* against all risks² it is then considered as a *pledge*, and does not destroy the debt; therefore, if the bill in this case be bad, though the bill itself cannot be proved under a fiat against the debtor, yet the original debt, or so much as remains due, may be proved.³ But where the antecedent debt is paid, the holder cannot then prove against any party to the bill.⁴

If the bill is taken as a *pledge*, it should in strictness be sold, and the produce applied in satisfaction or reduction of the creditor's debt; and if any part remains unsatisfied, he will be then of course entitled to prove for the residue: or the court will in some cases order, that the creditor shall be at liberty to bring an action on the bill in the name of the assignees, upon his indemnifying them, and undertaking to account for any surplus recovered. And in either case, if the amount of the bill or note exceeds the debt for which it is pledged, the creditor will have to pay the costs of the application, as in the case of an equitable mortgage upon the deposit of deeds without any written agreement.⁵

In some cases, where the bankrupt has merely *forgotten* to indorse the bill or note, which is transferred by him for a valuable consideration, it has been held, that he may indorse it after his bankruptcy⁶; for the act of indorsement is in such case considered a mere form, the transfer for consideration being the substance, which creates an equitable right, entitling the holder to call for the form.⁷ So, where the whole beneficial interest is out of the bankrupt, the assignees have been in that case ordered to indorse a bill under the above circumstances—in such a manner, however, as to secure them from

¹ *Ex parte Whitter*, C. B. L. 124. *Ex parte Roberts*, *ibid.* *Ex parte Smith*, *ibid.* *Bank of England v. Newman*, 1 Ld. Raym. 442. 12 Mod. 241. Com. Rep. 57.

² *Owenson v. Morse*, 7 T. R. 651.

³ *Ex parte Blackburn*, 10 Ves. 206. *Ex parte Rathbone*, Buck. 215.; and see *Richardson v. Kirkman*, C. B. L. 174.

⁴ *Ex parte Britten*, 3 D. & C. 35.

⁵ *Ex parte Brown*, 1 G. & J. 407. *Ex parte Rhodes*, S. C.; and see *ex parte Price*, 3 M. D. & D. 586. 2 Dea. 364. 3 M. & A. 217.

⁶ *Smith v. Pickering*, Peake, 50. Anon. 1 Camp. 492. n.

⁷ Per Sir T. Plumer, 2 J. & W. 243. *Ex parte Price*, 3 M. D. & D. 586, and cases there cited.

personal responsibility.¹ And where the payee of an accommodation bill indorsed it after an act of bankruptcy, it was holden, that this did not prevent the indorsee, for valuable consideration, from recovering on it against the acceptor.² So, where a bankrupt had transferred, without indorsing, a note for valuable consideration to B. & C., and afterwards died intestate, and B. took out letters of administration to him, and then indorsed the note to B. & C.,—it was held, that B. & C. might recover against the maker of the note,³ though it was given for the accommodation of the bankrupt, and though it was not indorsed until several years after it was due.

But the mere circumstance of indorsement, in the transfer of a bill or note, does not make a difference in estimating the rights of the parties, if the real meaning of the transaction was only *deposit*—the distinction depending not on the fact of indorsement, but on the intention of the indorser. In this case, however, it must be clearly established, that, notwithstanding indorsement, the object was nothing but deposit.⁴ Thus, where several bills were delivered to a mortgagee, some of which were indorsed and others not indorsed; and the question was, whether the bills were intended to be in the nature of a collateral security, or of an absolute transfer, the Court inferred (from their being a mortgage, and from the circumstance of some of the bills not being indorsed) that those which were indorsed were intended, as well as those unindorsed, to be held as a security only.⁵ And if A. give B. a bill to the amount of 300*l.*, as a *security* for a debt of 150*l.*—whether A. indorse it or not—B., as against A., can only prove 150*l.*, and he will be a trustee for A. in respect of any surplus which he may receive from the other parties to the bill.⁶ If the holder of bills indorsed by the bankrupts instead of proving for each bill, proves the whole amount of his debt, for which he states in his deposition, that he has received no security or satisfaction whatsoever except the bills he holds,—he will be precluded, after thus treating the bills as a security in his deposition, from saying afterwards they were not to be treated as a security, because they were indorsed.⁷ Indorsement is, however, always considered *prima facie* evidence of an absolute transfer, unless the object of mere

¹ Ex parte Greening, 13 Ves. 206.

Ex parte Moubray, 1 J. & W. 428.

Ex parte Price, 3 M. D. & D. 5 & 6;

but see ex parte Hall, 1 Rose, 13.

Ex parte Stewart, 1 G. & J. 344.

Wallace v. Hardacre, 1 Camp. 45.

² Watkins v. Maule, 2 J. & W. 237.

⁴ 19 Ves. 232.

⁵ Ex parte Baldwin, cit. 19 Ves. 230.

⁶ Per Lord Eldon, ibid.

⁷ Ex parte Burn, 2 Rose, 58.

deposit is clearly shown, or can be plainly inferred from the nature of the transaction between the parties.

Where A. employs B. to get bills discounted, which A. had not indorsed, and B. indorses them in his own name, the better to effect that purpose, and both A. and B. become bankrupt,—A.'s estate must relieve B.'s from the liability incurred by the¹ indorsements on these bills; though the case would be otherwise, if A. had told B. expressly that he would not indorse the bills; for then B. would have been an agent with only a limited² authority.

If the acceptor of a bill for value become bankrupt, and the indorser is obliged to pay it in consequence of the bankruptcy, he may prove the debt under the fiat, although it was not taken up by the indorser till *after* the fiat issued.³ It has been held, however, that a party so claiming to prove a bill taken up by him after the fiat issued, must himself have contracted a liability upon it *before* the issuing of the fiat. Where a bill, therefore, after the bankruptcy of the acceptor, was taken up by a party, who had previously discounted it, without indorsing it,—Lord Eldon refused him permission to prove it under the commission, upon the ground that he had not made himself liable on the bill by indorsement; observing, that all the cases of parties claiming to prove, in respect of the payment of bills after a commission of bankruptcy, have been, where the party is *himself liable* on the bill.⁴ But Lord Thurlow upon a former occasion said, that he considered it as a very clear point, that a bill of exchange, though *negotiated after* the bankruptcy of the acceptor, might be proved under his commission; as the debt accrued from the acceptor by his original acceptance of the bill.⁵ Accordingly, it has been holden, that the indorsee of a bill, though indorsed to him after the bankruptcy of the acceptor, might prove it under his commission, but only for such amount, as the indorser himself could have proved at the time of the commission.⁶ So that it should seem, if the case of *ex parte Isbester* could have been considered merely a *transfer of the bill for value* to a third person, after the commission against the acceptor—and not as a *payment* of the bill by a person,

¹ *Ex parte Robinson*, Buck. 113.

² *Fenn v. Harrison*, 3 T. R. 757.

³ *Ex parte Brymer*, C. B. L. 165.

Cowley v. Dunlop, 7 T. R. 565. *Ex parte Seldon*, cit. *ibid.* 570. *Ex parte Hale*, 3 Ves. 304. *Buckler v. Buttrant*, 3 East, 72. *Houle v. Baxter*, *ibid.* 177. *Joseph v. Orme*, 2 N. P. 80. *Contrà Brookes v. Rogers*, 1 H.B.

640. *Howis v. Wiggins*, 4 T. R. 714; but the two last cases were cases of sureties.

⁴ *Ex parte Isbester*, 1 Rose, 20.

⁵ *Ex parte Brymer*, ante; and see *ex parte Thomas*, 1 Atk. 73. 2 Wils. 135. *Bingley v. Maddison*, 7 T. R. 499.

⁶ *Ex parte Deey*, 2 Cox, 423.

who was in fact never a *party to the bill*, or liable to pay it—the bill might have been proved under the commission.

Where *bankers' notes* are bought up *after* their bankruptcy, they cannot be proved by the holder,—unless it can be shown that the persons from whom they were purchased, were individually entitled to a proof in respect of the notes.¹ But there have been some special exceptions² to this rule; and in one case, where one of the partners of the bank, after getting his certificate, took up the notes of the firm, he was permitted to prove,³ upon making an affidavit, that he would not have paid the notes, unless the holders had had a valid claim against the firm.

And in all these cases, where a bill is negotiated *after it is due*, whether by indorsement or mere delivery, the party receiving it takes it on the credit of the person transferring it, and subject to all the equities to which it may be liable; whereas *before* a bill is due, the party receives it on its own intrinsic credit, and is not bound to enquire into any circumstance existing between the person from whom he takes it, and any of the previous parties to the bill.⁴

Payment of bill after proof.—Where the holder of *several* bills, indorsed to him by a bankrupt for whom he had discounted them, proves for the aggregate amount of them, and any of the bills are afterwards paid *in full*, the amount of the bills so paid must be deducted from the proof, and the future dividends be paid only upon the residue of the debt.⁵ And the same, where the bills have been indorsed by the bankrupt as a security for a general balance, or for a debt even exceeding their amount, and the creditor proves the whole amount of his debt, excepting the bills as a security.⁶ And if the dividends have been paid upon the whole proof without such deduction, the assignees are not thereby concluded; for the lord chancellor, on petition, will order them to be refunded.⁷ In this respect, we perceive the rights of the creditor differ from the case, where he proves only a *single* bill; for *there* he is entitled to a dividend on the full amount of his proof, provided he does not receive in the whole

¹ *Ex parte Rogers*, Buck. 490.

² *Portsmouth bank* case, cit. *ibid.*

³ *Ex parte Atkins*, *ibid.* 479.

⁴ *Brown v. Davies*, 3 T. R. 80.
Boehm v. Stirling, 7 T. R. 427.
Brown v. Turner, *ibid.* 630. *Tinson v. Francis*, 1 Camp. 19. Chitt. 126.

⁵ *Ex parte Smith*, C. B. L. 155.

Ex parte Bloxham, *ibid.*

⁶ *Ex parte Wallace*, C. B. L. 155.

Ex parte Crossby, *ibid.* *Ex parte Rufford*, 1 G. & J. 41. *Ex parte Barratt*, *ibid.* 327. *Ex parte Brunskill*, 4 D. & C. 442.

⁷ *Ex parte Burn*, 2 Rose, 55.

more than 20s. in the pound.¹ But when *several* bills are thus proved—as each bill forms a separate and distinct portion of the whole debt—if a creditor was permitted, after one of the bills was paid *in full*, to take a dividend upon the gross sum, without deducting the amount of the bill paid off,—he would then be receiving, as to that portion of the debt which was composed of the paid bill, more than 20s. in the pound.

Where, however, after a creditor has made a proof, excepting a bill of evidence as a security, and the bill is not paid in full until *after* the creditor has received dividends in his whole debt, the assignees cannot call on the creditor to return the dividends on the account of the bill, but can only insist on a reduction of the proof.²

Where the acceptor of a bill becomes bankrupt, and another person after the bankruptcy takes up the bill for the honor of the drawer, that person has no right to prove against the estate of the acceptor, unless the acceptor had effects of the drawer's in his hands; but such person can only stand in the place of the drawer.³

Accommodation bills.] With respect to proof of what are termed *accommodation* bills—that is, bills to which one of the parties has subscribed his name, without receiving any value—the holder of a bill of this description, who has *bonâ fide* given a valuable consideration for it, is not affected by the want of consideration between the other parties.⁴ But such bill cannot be proved as between the parties to the accommodation.⁵ And where a debtor to a bankrupt's estate, after notice of the bankrupt's insolvency, acquired a bill with the bankrupt's name upon it, (which he *knew* then was a mere *accommodation* bill given by the bankrupt, and formed no demand upon the bankrupt's estate) with a view to set it off against his own debt, he was held not to be a *bonâ fide* holder of such bill;—and, having proved for the difference between the amount of the bill and the debt he owed the bankrupt, his proof was ordered to be expunged.⁶ When two persons, however, agree that the one shall accept and pay all bills, which a third may draw upon him on account of the other, and the drawer has effects in the hands of one of those

¹ Ante, 241.

² Ex parte Carr, 2 Dea. 273. But see ex parte Holmes, 4 Dea. 82.

³ Ex parte Lambert, 13 Ves. 174; overruling ex parte Wackerbath, 5 Ves. 574.

⁴ Cull. B. L. 97. Chitt. 442. Ex parte Vere, 2 M. & A. 123. 4 D. & C. 295.

⁵ Ex parte Solarte, 2 D. & C. 261.

⁶ Ex parte Stone, 1 G. & J. 191; and see Fair v. M'Iver, 16 East, 130.

parties, though not in the hands of the acceptor,—the acceptor, by such an agreement, makes himself equally liable with that party in whose hands the drawer has effects, and the drawer may therefore prove such bills under a fiat against the acceptor.¹

When a party lends his name upon a bill, whether as drawer, acceptor, or indorser, without receiving value for such accommodation, he is substantially a surety for the other party who has received a consideration for the bill; and if, through the default of that party, he is obliged to take it up, he is entitled, of course, to be indemnified by the estate of that party. In bills of exchange, Lord Hardwicke observes, there is a double contract—the first between the principal debtor and creditor, and also an implied contract that the principal debtor will indemnify the surety,—so that if the creditor (the indorsee) comes upon the surety (the indorser), the indorser or his assignees may come in against the original or principal debtor; and he added, that this was likewise the case, where *no consideration* was paid by the original drawer.² This principal has been often recognized in bankruptcy. As where the holder of a bill proved it against the person, who was ultimately bound to pay it, before he called upon the surety, and he afterwards received from the surety either the whole or a part of the debt,—the court was always accustomed to give the surety the benefit of the holder's proof³ under the commission. But there was a great hardship formerly, where the surety paid off either the whole of the bill, subsequent to the act of bankruptcy, or part of it before the creditor had proved; for in one case, the creditor could only prove for the residue of the debt owing at the time of the proof—and, in the other, the surety was held to be barred entirely from proving,—as, *quoad* him, it became a debt subsequent to the bankruptcy.⁴ To remedy this grievance to the surety, the 49 G. 3, c. 121, s. 8, first enacted, and the 6 G. 4, c. 16, s. 52, enacts nearly in the same words, that any surety or person liable for any debt of the bankrupt, though he pays the debt, or any part of it, after the commission issues, may stand in the place of the creditor, if the creditor has proved—and if not, then that the surety may prove his demand in respect of such payment, not disturbing former dividends. And this benefit is given

¹ Ex parte Marshall, 1 Atk. 89. Ex parte Marshall, 1 Atk. 129.
² 30. Ex parte Mathews, 6 Ves. 285.

³ Ex parte Walton, 1 Atk. 123.

⁴ Ex parte Ryswick, 2 P. Wms.

⁴ Brookes v. Rogers, 1 H. B. 640.
 Howis v. Wiggins, 4 T. R. 714.

to the surety, notwithstanding he may have become so even after an act of bankruptcy, provided he had no notice then of any act of bankruptcy. The words "person liable" in the above enactment, Lord Eldon has observed,¹ were adopted for the convenient latitude of comprehending all those who could not strictly be considered as sureties, but who were entitled to the same protection. Thus, the acceptor of a bill of exchange is not strictly a surety for the drawer,—the acceptor being, on the face of the bill, liable in respect of *his own* engagement merely; but if the debt, which the acceptor adopts, be in reality the debt of the drawer, and the contract between the drawer and acceptor be in the nature of an accommodation transaction; viz., that the drawer should be the person finally responsible,—in this case, though the acceptor would not strictly be a surety, yet he is a "person liable."

In conformity, therefore, with the above enactment, when the acceptor of a bill for the accommodation of the drawer is, after the drawer's bankruptcy, obliged to pay it—though the bill itself is, strictly speaking, gone by the acceptance being paid,—yet the acceptor may prove for the amount, as having paid it for the use of the drawer.² And the like where a party draws and indorses a bill for the accommodation of the indorsee, and is obliged to pay it through the default of the acceptor.³ And such proof, as it should seem, may also include the costs (if previously ascertained) of an action brought against the acceptor by the holder, in consequence of the drawer not providing funds to pay the bill when due.⁴ If the acceptor assigns his debt to a third person, he may be called upon by such assignee to prove it, and the assignee will be entitled to all the dividends in respect of it.⁵

This equity (which is now in fact become a legal right) of the surety on a bill, to stand in the place of the holder who has proved it under a fiat, was (before the 49 G. 3, c. 121) so far qualified, that it was not permitted to operate to the

¹ 3 V. & B. 40. And yet it has been decided that the drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorsee, was not surety for or liable for the debt of that indorsee, within the meaning of the 49 Geo. 3, c. 121, s. 8. *Mayer v. Meakie*, 1 Gow, 183.

² *Ex parte Lloyd*, 1 Rose, 4. *Stedman v. Martinant*, 13 East, 427. *Bassett v. Dodgin*, 9 Bing. 653. *Filley v. Langford*, 4 Scott, N. R. 208, 611. Before the 49 G.

3. c. 121, this could not be done. See *ex parte Walton*, 1 Atk. 122. *Chilton v. Whiffin*, 3 Wils. 13. *Young v. Hockley*, *ibid.* 346. *Vanderheyden v. De Paibe*, *ibid.* 528. *Snaith v. Gale*, 7 T. R. 364. *Ex parte Beaufoy*, C. B. L. 158. *Heskuyson v. Woodbridge*, Doug. 166.

³ *Haigh v. Jackson*, 3 Mee. & W. 598.

⁴ *Vansandau v. Corbisie*, 3 B. & A. 13. 8 Taunt. 550. 2 Moore, 602.

⁵ *Ex parte Lloyd*, *supra*.

prejudice of the holder, if the latter had any other distinct demand against the bankrupt's estate; so that if there would be any diminution of the dividends upon such distinct debt, occasioned by the surety's standing in his place and receiving dividends upon the amount of the bill, such diminution was directed to be made good out of the dividends receivable by the surety.¹ But this point has been differently decided since the 49 G. 3, c. 121. As, where a surety on a note, after the bankruptcy of the debtor, paid it off to the creditor, the latter having previously proved for a greater amount, and received a dividend on the gross amount of his debt,—Lord Eldon ordered, that the surety should receive from the creditor the dividend on the note, which the creditor had already been paid.²

As to the discharge of the surety on a bill or note, by the holder discharging or compounding with the principal, see post, title "sureties."

Cross bills.] Where, however, a party lending his name on a bill or note for the accommodation of the bankrupt, had taken for his own security a counter bill, with the bankrupt's name upon it, he was, independently of the 49 Geo. 3, c. 121, permitted to prove the latter under the commission, though the former bill had not become due. For the mere liability to pay money was held a good consideration for a bill of exchange, and would entitle the party to come in as a creditor under the commission, although the payment in respect of the liability was *in futuro*, or depended upon a contingency.³ And this, it was said, did not militate against the old rule, that contingent debts were not proveable; because the claim under the commission was upon an instrument creating an absolute debt at law.⁴ But though the holder of a counter-bill could prove it before the other bill became due, yet the practice was to reserve the dividends, until it appeared to what extent he had been damnified, and whether he had exonerated the bankrupt's estate from the bill or acceptance, given by him to the bankrupt in exchange for such counter-

¹ Ex parte *Turner*, 3 Ves. 243.
Ex parte *Rushworth*, 10 Ves. 409.
Paley v. Field, 12 Ves. 435.

² Ex parte *Brook*, 2 Rose, 334.
Ex parte *Holmes*, 4 Dea. 826, reversing S. C. 3 Dea. 662.

³ *Toussaint v. Martinant*, 2 T. R. 100.
Hodgson v. Bell, 7 T. R. 97.

⁴ Ex parte *Maydwell*, C. B. L. 252.
Rolfe v. Caslon, 2 H. B. 570.

Ex parte *Beaufoy*, C. B. L. 158.
Ex parte *Clanricarde*, *ibid.* 160.
"To such miserable devices," says Mr. Eden, "were the courts compelled to have recourse, in order to effect substantial justice, and to elude the operation of a harsh and inequitable rule of law."—Eden, B. L. 141.

bill.¹ It was afterwards doubted, whether such proof ought to have been permitted, before the party applying to prove had taken up his own paper, or had paid the original debt.² And it seems now to be a settled rule, that the surety claiming to come in as a creditor upon an exchange of acceptances must, before he can be permitted to prove, take up his own bills, or exonerate the bankrupt's estate from any liability in respect of them.³

Where there has been a mere exchange of acceptances for the *same sum* between the creditor and the bankrupt, the creditor cannot prove against the bankrupt any payment made on the creditor's own acceptance; for in such a transaction the law considers, that the creditor did not give his own acceptance in consideration of a promise of indemnity from the bankrupt, but in consideration of an actual and executed delivery of the other acceptance. Each party, therefore, under these circumstances, is held to have liquidated his claim on the other, by the acceptance which he takes in lieu of his own.⁴ Whether, in other exchanges of paper between two parties, one acceptance is to be considered as given, or one bill transferred in consideration of the other, must be determined by the particular circumstances of each case.⁵ Any variation in the time of payment, or of the amount, of the respective bills, is evidence, whether the parties did, or did not, transfer the bills in consideration of each other, though not conclusive evidence. But an agreement by each party to pay *his own* acceptances is conclusive evidence, that the bills were given in consideration of each other.⁶ Where, upon an exchange of acceptances, one party takes up and pays his own acceptance after the bankruptcy of the other, and the bankrupt's acceptance has not been proved by any other holder, the drawer may, of course, prove it under the fiat. But if both parties become bankrupt, and the acceptance of one party has been proved by the holder of it against the estate of the drawer, as well as against that of the acceptor, and the holder receives dividends under each fiat, the amount of the dividends paid by the assignees of the drawer cannot be proved under the fiat against the acceptor; for that would be charging the estate of the acceptor twice for the same debt.⁷

In transactions of this nature, where both parties become

¹ *Ex parte Curtis*, C. B. L. 162.
Ex parte Lee, *ibid.* *Ex parte*
Browne, *ibid.*

² *In re Borones*, C. B. L. 161.

³ C. B. L. 162. *Ex parte Blos-*
ham, 8 Ves. 531.

⁴ *Cowley v. Dunlop*, 7 T. R. 565.
Buchler v. Buttivant, 3 East, 72.

⁵ *Per Lord Ellenborough*, 3 East,
76.

⁶ *Ibid.* 7 T. R. 565. Chitt. 443.

⁷ *Cowley v. Dunlop*, 7 T. R. 565.

bankrupt, and there has been a considerable exchange of paper between them, questions of great difficulty frequently occur in determining the amount of proof to be made by the assignees of that party, who has accepted to a greater amount than the other,—more especially, if there happen to be outstanding acceptances of each party capable of proof by the respective holders, or bills which have been already proved under such fiat. In one case of this kind, where the assignees of one firm claimed to prove against the estate of the other outstanding bills, that might be proved by the holders against both estates, Lord Loughborough held, that, as between the two estates, no proof could be made of the unsatisfied bills of either party; and he directed an account of the dealings between the parties to be taken, excluding those bills, and the balance to be ascertained upon the general dealings between them, considering bills duly honoured as so much cash, for which balance only the proof was ordered to stand.¹ In a subsequent case, under the same bankruptcy, where the assignees of one house petitioned to prove against the estate of the other, not only for the cash balance between the two estates, but also in respect of the dishonored bills, part of which having been negotiated, were proved by the respective holders against both estates,—Lord Loughborough said, that upon consideration of the case of *Ex parte Walker* it struck him, that there were but two ways of taking the account between the two estates—either to consider all the bills to be struck out of the case entirely, as if issued for a bad purpose, like gambling transactions, &c., upon which there could be no proof—or to consider them all as good bills; and he permitted the cash balance in this case only to be proved.² And where part of the account between two mercantile houses, which become bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of those bills, as between the two houses, unless there is a surplus after satisfying the holders of the bills.³

This above principle adopted by Lord Loughborough was also recognised by Lord Eldon in the following case, where there were mutual advances of cash between the parties, but paper upon one side only. A. and B. had dealings together,

¹ *Ex parte Walker*, 4 Ves. 373.

² *Ex parte Earle*, 5 Ves. 833. Mr. Christian, in his observations on these cases (vol. 2, 390), proposes a different arrangement from either of the plans suggested by Lord Loughborough, namely, that all cross

paper should be proved,—but no cash balance, if the party to whom the balance was due has drawn bills, which have been already proved to the amount of the balance.

³ *Ex parte Rawson*, 1 Jac. 274. *Ex parte Laforest*, 2 Dea. & C. 199.

in the course of which it appeared that B. had received from A., in *cash and bills*, 6,424*l.* 9*s.* 3*d.*, and A. had received from B., in *cash alone*, 5,284*l.* 19*s.* 7*d.*; making a balance of 599*l.* 9*s.* 8*d.* upon the whole account in favour of B. Both became bankrupt, and several of the bills delivered by A. to B. (amounting to 1,098*l.*) were dishonoured, and proved against both estates, and dividends paid upon them. B.'s assignees applied to prove 498*l.* 10*s.* 4*d.* under A.'s commission, insisting that the 1,098*l.* should be deducted from the 6,424*l.* 9*s.* 3*d.*, and there would then be that balance due to B.'s estate. Lord Eldon admitted the proof, but held that the assignees of A. were entitled to retain and apply the dividends payable in respect of such proof, for the exoneration of the estate of A. from all the dividends, which it should be obliged to pay in respect of the proof of those¹ dishonoured bills so proved against both estates. Upon this principle the following case appears to have been decided:—A. and B. exchanged their acceptances of various bills drawn upon them respectively by C., and all three became bankrupt before any of the bills fell due, and the acceptances of A. were negotiated by the drawer C., and were proved by the holders under each commission, who received dividends on their respective proofs. It was held that A.'s assignees might prove the amount of B.'s acceptances under B.'s commission, subject to a retention of the dividends until it was ascertained what each estate would pay on the whole of their liabilities.²

But where bankers accepted bills for the accommodation of the bankrupt, who had kept cash with them, and was in the habit of remitting bills to them from time to time to cover the acceptances when they became due,—and at the date of the commission the bankers were under acceptances for the bankrupt, and also held bills drawn by the bankrupt, none of which acceptances or bills were due at the time of the bankruptcy,—Lord Eldon held that upon this sort of transaction, the bankers, taking up their own acceptances, were entitled to prove upon the securities they held, but not for the cash balance.³ And since the operation of the provision in the 6 Geo. 4, c. 16, s. 52, for the protection of sureties, a new principle has been introduced in the decision of this class of cases relating to cross-paper transactions. So that if A. has accepted bills for the accommodation of B., the bankrupt, and does not pay them when due,—and B. has given A. bills or notes to secure any debt or balance due to

¹ Ex parte Metcalf, 11 Ves. 404.

² Ex parte Bloxham, 8 Ves. 531.

³ Ex parte Solarte, 3 D. & C. 419.

him,—and any of such acceptances, bills, or notes are afterwards negotiated and proved by the respective holders against B.'s estate, to a larger amount than any cash balance due from B. to A.,—such cash balance will not be permitted to be proved under B.'s fiat. And, notwithstanding A. actually pays any of the bills which have been proved under the fiat—all that he can claim is, to have the benefit of the proof in respect of the particular bills¹ which he is obliged to pay.

If, by giving an acceptance, a debt be constituted, which may be proved under a fiat against the acceptor, that is as much a consideration for a bill, as if the value of the bill had actually been paid in money. Thus, where G. and Co., being largely indebted in a drawing account to F. and Co., paid to them a bill, which the latter indorsed to D. and Co.; and then G. and Co., F. and Co., and two other parties to the bill having become bankrupt and insolvent, D. and Co. by proving it under each commission, and receiving a composition from the estate of the insolvent, obtained altogether 20*s.* in the pound;—it was held, that, although G. and Co. were only indebted to F. and Co. in respect of F. and Co.'s acceptances, which were in fact not paid when F. and Co. became bankrupt, yet that the assignees of F. and Co. were entitled to stand in the place of D. and Co., in respect of the proof made by the latter under the commission against one of the other parties to the bill, to the extent of the dividends which had been paid to D. and Co., under F. and Co.'s commission.²

Where, by agreement between the plaintiffs (bankers at Carlisle) and the defendants (bankers at Newcastle), the plaintiffs were weekly to send defendants all the notes issued by the defendants, as well as the notes of certain other banking houses, which might come to the plaintiffs' hands,—and the defendants were in exchange to return to the plaintiffs all their own notes, and the notes of certain other bankers which might come to the defendants' hands, and the deficiency was to be made up by a bill drawn by the defendants in favor of plaintiffs at a certain date,—it was held, that the notes so sent by the plaintiffs constituted a debt against the defendants, which the latter might pay by a return of notes according to the agreement; but that if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission issued

¹ *Ex parte Read*, 1 G. & J. 224.

² *Ex parte Greenwood*, Buck. 237.

against the defendants, on an act of bankruptcy committed after the time, when the bill for the balance (if drawn) would have been due and payable.¹

The holder of a bill or note, who has discounted it for the previous holder, may prove against any of the parties to the bill for the *full amount*.² And, as an assignee or indorsee of a bankrupt's notes, who has bought them in at 10s. in the pound, may take out a commission on such notes,³—it should seem, that he might equally prove the full amount of them as a general creditor, and receive dividends upon that amount under the commission.

The *costs and charges* of *protesting* bills might formerly be proved, if they were incurred before the act of bankruptcy; but those incurred afterwards could not be proved. But now, it is apprehended, under the 47th section of the 6th Geo. 4, c. 16, all such costs are proveable, if they were incurred before the issuing of the fiat, and before notice of the bankrupt's insolvency. And such costs and charges may also include the consequential damages, which, by the law of a foreign state, the drawer or indorser of a returned bill is obliged to pay beyond beyond the amount of the bill. As, where bills drawn by a trader in Pennsylvania upon the bankrupt in England were protested and returned to the drawer, some for non-acceptance, and others for non-payment,—and by a law of that state the drawer or indorser of a bill so returned must pay it with 20 per cent. advance for damages, which the drawer in this case accordingly paid,—Lord Camden admitted the drawer to prove the 20 per cent. under the commission, saying, that *that per centage* was part of the original contract; for the nature of the engagement was to pay the bills when due, or the 20 per cent. in addition (according to the law of Pennsylvania) the same as if it had been by express stipulation.⁴

Re-exchange, when it is only the value in sterling money of the bill payable abroad in foreign money, has been held proveable, notwithstanding the value of the foreign money was greater at the time of re-drawing, than at the time of negotiating the bill.⁵ But the re-exchange must not include damages and costs arising upon protest of bills after the issuing of the fiat.

Interest on bills now proveable.] With respect to interest

¹ *Forster v. Surtees*, 12 East, 605.
And see *Gillard v. Wise*, 5 B. & C.
134.

² *Ex parte Marlar*, 1 Atk. 150.

³ *Ex parte Lee*, 1 P. Wms. 782.

⁴ *Francis v. Rucker*, Amb. 672.

⁵ *Ex parte Hoffman*, C. B. L. 175.

on bills and notes,—the practice was formerly not to allow it to be proved, unless it was expressed in the body of them;¹ or unless there was a special agreement or custom of the trade to that effect;² the rule in bankruptcy differing from the rule in equity in this respect, which allows interest on bills and notes (payable on demand, or on a day certain) to be calculated from the demand, or the day.³ But now, by the 57th section of the 6th Geo. 4, c. 16, the holder of any bill or note, which is overdue at the issuing of the commission, though interest is not reserved by it, may nevertheless prove for interest upon it up to the date of the fiat, at such rate as is allowed by the court of Queen's Bench in actions upon bills or notes. And where a creditor, with whom a bill of exchange had been deposited as a security, first proved his debt against the estate of the drawer (his principal debtor) and thereby, and by other means, reduced his debt to 14l.,—he was held entitled to prove under a commission against the acceptor, not only the 14l. but also all the interest due upon his whole debt up to the time of making that proof, for the perfect liquidation of the account, in respect of which he held the bill as a security.⁴ Where a bill is drawn payable at a given time after date for a specified sum, “with lawful interest for the same,” interest is to be computed from the *date* of the bill.⁵

As to the right of the bill-holders to double proof, or election of proof, where there are separate trades or firms, see post, p. 660.

SECTION XVI.

Policies of Insurance.

Formerly all debts which might become due and payable on *policies of insurance*, or *bottomry* and *respondentia bonds*, being (as such debts are) contingent in their nature, were not proveable under a commission of bankrupt, unless the contingency had happened before the act of bankruptcy. Relief was first afforded to creditors holding these securities by the 19 Geo. 2, c. 32, s. 2, which enabled them first to make a

¹ Ex parte *Marler*, 1 Atk. 151.
Ex parte *Cocks*, 1 Rose, 317. Ex
parte *Champion*, 3 Bro. 436.

² Ex parte *Hankey*, 3 Bro. 504.
Ex parte *Mills*, 2 Ves. 295. Ex parte
Williams, 1 Rose, 399.

³ *Lowndes v. Collins*, 17 Ves. 27.
Ex parte *Cock*, 1 V. & B. 342. Ex
parte *Cocks*, 1 Rose, 317.

⁴ Ex parte *Martin*, 1 Rose, 87.
⁵ *Doman v. Dibden*, 1 Ry. & M.
381.

claim, and afterwards prove when the contingency took effect. The 6 Geo. 4, c. 16, s. 53, adopts that provision, declaring that the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, made upon good and valuable consideration, shall be so admitted to claim, and after the loss to prove his debt or demand, and receive dividends, as if the loss or contingency had happened before the issuing of the commission against the obligor or insurer. And the person, also, who effects the policy, may prove for any loss, though not beneficially interested in the ship or goods, in case the person really interested is out of the realm.¹

Insurances upon lives are within this enactment; for, though they are not expressly mentioned, the enacting words are sufficient to comprehend them.²

A debt upon a policy of insurance on *foreign* property, where the loss happens by capture by any British or co-belligerent vessel after the commencement of hostilities, although the policy itself was effected during peace, is not proveable, nor even after the return of peace;³ for every insurance on *alien* property by a British subject must be understood with this implied exception, that it shall not extend to cover any loss during the existence of hostilities between the respective countries of the assured and assurers.

SECTION XVII.

Rent.

A landlord having a general right to distrain goods for rent, as long as they remain on the premises for which the rent is due, neither the issuing of a fiat against the tenant, nor the messenger's possession of his goods, will prevent him from exercising that right. But by 6 Geo. 4, c. 16, s. 74, the landlord cannot now, after the act of bankruptcy, distrain for more than *one year's rent*; and that must have become due before the date of the fiat. If more than a year's rent therefore is due to him, he can only prove for the residue; the law, in this respect, putting him upon the same footing in bankruptcy, as when his tenant's goods are seized by the sheriff under an execution, in which case he is only

¹ This last provision is taken from the 49 G. 3, c. 121, s. 16.

² *Cox v. Liotard*, 1 Doug. 166.

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³ *Ex parte Lee*, 4 Mont. B. L. App. 13. 13 Ves. 64. *Brandon v. Curling*, 4 East, 410.

entitled to a year's rent out of the goods so seized.¹ As long, however, as the goods continue *on* the premises, whether before or after the choice of assignees, or even after the assignees have sold them, the landlord will be entitled to distrain for the whole year's rent.²

But in a case, where the landlord proved the amount of the rent due to him, and permitted the assignees to sell the goods to a third person, who thereupon took possession of them, and resided on the premises,—and the landlord, three years after proving his debt, distrained upon the goods as being still upon the premises,—Lord Hardwicke, after great consideration, determined, that the vendee of the goods was entitled to retain them; and confined the landlord to his remedy under the commission.³ And indeed it should seem now, under the equitable construction of the 59th section of the 6 Geo. 4, c. 16, (which declares that the proving or claiming a debt by a creditor shall be an election to take the benefit of the commission, with respect to the debt so proved,) that whenever the landlord had once proved or claimed the whole amount of his rent under a fiat, his doing so would be deemed equally an election, and would amount to a waiver of his remedy by distress.

Whenever the goods are taken *off* the premises, after being sold by the assignees, the landlord then loses his remedy altogether by distress, and can only come in under the commission *pro rata* with the rest of the creditors.⁴ And in one case, though he had in fact distrained before the bankruptcy, but the tenant had replevied the goods, and the replevin cause was pending at the time of the bankruptcy, the landlord was held to have lost his lien.⁵ Nor, when the goods are once actually removed, is the landlord entitled to a lien for a year's rent, under any equity of the statute which gives the landlord a year's rent in the case of an execution; for a fiat in bankruptcy is not an execution within the meaning of that statute.⁶ Therefore, where a sheriff seized and sold goods under an execution after an act of bankruptcy, it was held, that he was not entitled, out of the produce of the sale, to retain for a year's rent which he had paid to the landlord, unless he could show that such payment was made without notice of the commission.⁷ But in an action by the landlord

¹ 8 Ann. c. 14.

⁵ *Bradyll v. Ball*, 1 Bro. 427.

² *Ex parte Plummer*, 1 Atk. 103.

⁶ *Ex parte Devine*, C. B. L. 177.

Ex parte Jacques, 1 Atk. 104. *Ex parte Dillon*, *ibid*.

Lee v. Lopes, 15 East, 230; but see

2 Bl. Com. 487, *contra*.

³ *Ex parte Grove*, 1 Atk. 104.

⁷ *Lee v. Lopes*, *supra*.

⁴ *Ex parte Deschermes*, 1 Atk. 103. *Ex parte Grove*, *ibid*. 104.

against the sheriff for not paying a year's rent, it was held by the court of Exchequer to be no answer, that the tenant was bankrupt when the execution was executed, and that the goods were therefore no longer his property, but that of the assignees, and that the sheriff ought not to be liable both to the assignees and the landlord.¹ If the goods however are fraudulently or clandestinely removed by the assignees to avoid a distress for rent, then the landlord has a right, under the 11 Geo. 2, c. 19, s. 1, to follow the goods, and distrain them wherever he may find them, within thirty days after their removal.

But, unless a landlord *actually distrain* the goods of his tenant, he can have no *lien* on them whatever for his rent. When it is said, therefore, that a mortgagee of a bankrupt's leasehold estate, who pays the arrears of rent due to the bankrupt's landlord, may apply to the court for an order that he may stand in the place of the landlord with respect to his right to distrain,²—that can only have reference to a case, where the arrears have been paid upon a *distress already made* by the landlord,—or at least, where there are goods still remaining on the premises for the landlord to distrain.

Although a landlord cannot, in general, distrain until the rent becomes due, yet, if the agreement be otherwise, or there is a custom of the country to the contrary, there is no objection to it in point of law. Therefore, where a bankrupt (who had previously committed an act of bankruptcy) took a shop, and agreed to pay half a year's rent in advance, and by the custom of the country also that proportion of rent was payable on the day on which the tenant entered,—the landlord was held entitled, before the first half year expired, to distrain the goods on the premises for half a year's rent; and the landlord having in fact bought the bankrupt's goods at the sale under the commission, it was also held that he had a right to retain the amount of the rent out of the purchase money³ due to the assignees. In this case, though there was no actual distress, yet, the landlord being in possession of the goods as a purchaser, it was considered that he had the remedy of distress in his own hands, by preventing the goods (as purchaser) from being removed off the premises, until he chose to exercise his rights as landlord.⁴

¹ *Duck v. Braddy*, 13 Pri. 455.

² 1 Atk. 103.

³ *Buckley v. Taylor*, 2 T. R. 600.

⁴ It might, however (as Mr.

Christian suggests, vol. 2, 510), have been contended in this case with some reason, that the fact of the landlord purchasing the goods under

Where on a distress for rent, goods were sold producing a surplus after satisfaction of the rent, which surplus remained in the hands of the bailiff, who afterwards became bankrupt; and the tenant died, and his executor claimed this money of the assignees, in preference to the other creditors of the bankrupt; it was held that, as the bailiff had embezzled the money, the executor must come in with the rest of the creditors,¹ though, if anything had *remained in specie*, the case might have been different.

As the landlord can only prove for the amount of the rent actually due, and not for any future rent, in order to protect landlords therefore from any loss of future rent accruing after the bankruptcy of their tenants, it is enacted by the 6 Geo. 4, c. 16, s. 75, that if the assignees of a bankrupt, who is possessed of leasehold premises, shall not, upon being required by the landlord, elect whether they will accept or decline the lease, the landlord may apply, by petition to the lord chancellor, for an order that they shall so elect, and in case they shall decline the lease, then that the lease and the possession of the premises may be delivered up to the landlord.

For further information on this head, the reader is referred to that part of the following chapter² which treats of the duty of the assignees in collecting the bankrupt's property.

SECTION XVIII.

Interest.

The rule in bankruptcy as to the proof of interest is, that none is proveable but what arises by *contract*; for if there be no contract, interest is then only matter of damages, and is given as such merely in an action at law. When, indeed, interest is part of the contract, it is then as much a debt as the principal; but where it is matter of damages, as damages not liquidated cannot be proved under the fiat, so neither can interest in the shape of damages.³ And this principle has been recognized, as well in the event of a surplus,⁴ as in the case of proof.

the commission, was rather an abandonment of his right to distrain, than an assertion of it.

¹ Ex parte *Dobson*, 7 Vin. Ab. 74.

² Post, ch. 10.

³ Ex parte *Furneaux*, 2 Cox, 219; and see post, "Damages."

⁴ Ex parte *Champion*, 3 Bro. 436. Ex parte *Hankey*, *ibid.* 504. Ex parte *Mills*, 2 Ves. 295.

But whether the contract to pay interest is *express* or *implied*, the creditor is in either case entitled to interest at law upon his debt; and the contract may be collected either from the agreement between the parties, from the nature of their dealings with each other, or from the usage and custom of trade, as applicable to the particular transactions that have passed between them.¹

Interest on *bills of exchange and promissory notes* was (as we have already seen)² not proveable before the 6 Geo. 4, c. 16, s. 57, unless the bill or note bore interest on the face of it; but it is now proveable down to the date of the fiat.

A *specialty creditor* cannot have interest calculated, so as to exceed with the principal the amount of the penalty³ contained in his security.

A mere *depository* is not in general chargeable with interest, unless he has himself made interest of the property deposited.⁴

Interest upon interest, that is, *compound interest*, is not commonly allowed;⁵ though it is said, that in the dealings of merchants, where there are regular accounts settled from time to time, and a sum for interest debited and allowed by either party, interest upon interest is then admitted to be proved, on the ground of an original contract to pay it; and that the settling accounts in that way is evidence of an original contract. And in a case where an executor became bankrupt, and the testator had directed the property to *accumulate*, Lord Eldon charged the estate with interest at five per cent. with rests, on the principle of an *implied contract* to pay such interest, in respect of the trust imposed upon him.⁶

But no creditor is allowed to prove for interest, calculated to a period lower than the *date of the fiat*;⁷ and as such proof cannot be made directly, so neither can it be indirectly thrown upon the estate, except in the event of a surplus.⁸ Thus, if a mortgagee, after sale of the mortgaged premises, applies to prove the residue of his debt, he is only entitled to

¹ Ibid. Ex parte Boyd, 1 G. & J. 285.

² Ante, 263.

³ Bromley v. Goodere, 1 Atk. 80. Ex parte Mills, 2 Ves. 301. Tew v. Earl of Winterton, 3 Bro. 489. Knight v. Maclean, ibid. 496.

⁴ Bromley v. Child, 1 Atk. 259.

⁵ Ex parte Morris, 1 Ves. 132.

Bromley v. Goodere, supra. Waring v. Cunliffe, 1 Ves. 99.

⁶ Dornford v. Dornford, 12 Ves. 127.

⁷ Bromley v. Goodere, supra. Ex parte Bennet, 2 Atk. 527. 14 Ves. 573.

⁸ Ex parte Paton, 1 G. & J. 332. Ex parte Gass, ibid. 338, n.

prove for interest up to the date of the fiat:¹ though if the estate mortgaged is sufficient to answer the principal and interest, the assignees cannot in that case redeem without paying interest to the time of redemption.² But, where there was an order for superseding a commission, upon payment by the bankrupt of what should be settled by the master to be due to the creditors under the commission, Lord Hardwicke held, that the creditors were entitled to interest from the date of the master's report to the day of payment, as in the common case of a reference to the master in a cause to state what is due for principal and interest.³ Where there is a mutual credit between the bankrupt and the creditor, the computation of interest should be stopped at the same time on both sides of the account.

In a case where the creditor had sold goods to the bankrupt, and agreed, if prompt payment were made, to deduct 33 per cent. from the price; but no payment being made at the stated times, the creditor applied to prove the whole charge for the goods, without deducting the 33 per cent., contending that this was a contract to accelerate payment, rather than to give day of payment; the lord chancellor said, they could not make the debt more than the real price of the goods, and dismissed the petition.⁴

Where a surety of the bankrupt paid the debt, and the interest which had *accrued subsequent* to the commission, it was decided that he could not prove such subsequent interest but only in the same way as the original⁵ creditor.

In case of a surplus.] But in case the estate of the bankrupt produces a surplus, after paying 20s. in the pound, then by 6 Geo. 4, c. 16, s. 132,⁶ the creditors, whose debts are by law entitled to carry interest, are first to receive interest on their debts at the rate reserved, or by law payable thereon, to be calculated from the date of the fiat. And after such interest shall have been paid, then all other creditors who have proved may receive interest on their debts from the date of the fiat at the rate of four per cent.⁷ The interest is in such case to be calculated on the whole debt up

¹ Ex parte *Wardell*, C. B. L. 181. Ex parte *Hercy*, *ibid.* Ex parte *Badger*, 4 Ves. 165.

² 7 Vin. Ab. 110.

³ Ex parte *Rooke*, 1 Atk. 244.

⁴ Ex parte *Ainsworth*, C. B. L. 191. 4 Ves. 678. S. P. Ex parte *Pigou*, 3 Madd. 136.

⁵ Ex parte *Wilson*, 1 Rose, 137.

⁶ This section, it has been held, does not operate retrospectively. Ex parte *Shepard*, Mont. & M. 67.

⁷ And see *Butcher v. Churchill*, 14 Ves. 573. Ex parte *Hill*, 11 Ves. 654. Ex parte *Boyd*, 1 G. & J. 285.

to the first dividend, then upon the principal money unpaid, after deducting the amount of that dividend up to the second dividend, and so on.¹

The former rules will of course be applicable, as to the right of interest between these two classes of creditors. Thus the holders of bills of exchange, if no interest is reserved upon the face of them, or by express or implied agreement, will be included only in the latter class of creditors, and be postponed until the payment of all interest that may be due to the first class. For the 57th section of the statute, which (as we have seen)² allows holders of bills to prove for interest, does not alter the *nature of the agreement* between the holder and the party liable upon the bill, but only gives the holder a right to prove for a demand not proveable before. So, upon the principle that a bond creditor is not entitled to interest beyond the penalty, it will follow, that such a creditor will, to the amount of the penalty of the bond, be entitled to interest with the creditors of the first class, viz., of those whose debts carry interest—and, for any interest beyond the penalty, he will rank with the creditors of the second class.³

This claim, however, of the creditors for additional interest in the event of a surplus, it has been determined, cannot be set up by them so as to diminish the bankrupt's allowance.⁴

Where the fiat is a joint one, the creditors of the separate estates are not entitled to such additional interest upon their debts, until the joint creditors have also received 20s. in the pound,—the rule being, that where there is a surplus of the separate estate, that surplus shall not go immediately to pay such interest to the separate creditors, but shall first be applied to make the joint creditors equal with the separate creditors, as to the principal of their respective debts;⁵ and there is nothing in the provisions of the 6 Geo. 4, c. 16, to vary this rule. *Ex parte Minchin*, 2 G. & J. 287. And, therefore where a commission issued against three partners, and the joint estate being insufficient to pay 20s. in the pound, the deficiency was paid from the separate estate of one of the partners, and there was a surplus on the separate

¹ *Re Higginbottom*, 2 G. & J. 123.

² *Ante*, 263.

³ See Lord Henley's B. L. 367, et seq. and a note by the same learned author, to the case of *Tew v. Earl of Winterton*, in his edition of *Brown's Reports*, vol. 3, 489.

⁴ *Ex parte Morris*, 3 Bro. 79. 1 Ves. 132; and see post, "Bankrupt's Allowance."

⁵ *Ex parte Boardman*, C. B. L. 184. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 590. *Ex parte Wood*, 2 M. D. & D. 283.

estates of the others, it was held that the partner, whose estate paid the deficiency, was entitled to contribution for such surplus, before interest was paid to the separate creditors.¹ But where both joint and separate estates have paid 20s. in the pound, and there happens to be a debt due from the separate estate to the joint estate, or from the joint estate to the separate estate,—neither the partnership can be admitted a creditor upon the individual partner, nor the individual partner upon the partnership, until all such additional interest is paid to every class of creditors, who have proved debts under the fiat. For, as the partnership itself, in such a case, or some of the partners, are themselves debtors to the creditors of every class,—and as the principle is, that the debtor cannot come in competition with the creditor,—it follows, that neither the partnership, nor any individual partner, can claim a debt from the estate of either one or the other, until all the creditors of each are fully satisfied their demands, which include both the principal and interest of their respective debts.² And therefore where there is a surplus of the joint estate of three partners which is indebted to the separate estate of two of them composing a distinct firm, the creditors of the three are entitled to interest, before the surplus is carried to the estate of the two.³

Where the surplus consists of real, as well as of personal estate, the personal estate is first to be applied in payment of interest, and if that is deficient, then the real estate may be resorted to.⁴ It seems, that the commissioner may make the computation of such additional interest, without a previous order of the court.⁵

A creditor, who has given a receipt in full, or delivered up securities, under a mistaken impression that there would be no surplus, is not thereby barred of his right to interest in the event of a surplus.⁶

Where a creditor is obliged to petition, in respect of his proof, for payment of a *dividend* which has been declared under the fiat, he will be entitled to interest upon such dividend; and in such a case it was ordered to be computed at the rate of five per cent.⁷

¹ Ex parte *Riz*, Mont. 237.

² 9 Ves. 588.

³ Ex parte *Ogle*, Mont. 350.

⁴ *Bromley v. Goodere*, 1 Atk. 81.

⁵ Ex parte *Morris*, 1 Ves. 132.

⁶ Ex parte *Deey*, 2 Ball. & B. 77.

⁷ Ex parte *Loxley*, 1 G. & J. 345.

SECTION XIX.

Costs.

(And see ante, "*Judgments*," and post, "*Damages*.")

By 6 Geo. 4, c. 16, s. 58, if any plaintiff¹ in any action at law, or suit in equity, or petitioner in bankruptcy, or lunacy, shall have obtained any judgment, decree, or order, against any person who shall thereafter become bankrupt, for any debt or demand, in respect of which such plaintiff or petitioner shall prove under the commission, he may also prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.

But costs incurred *after* the bankruptcy are not proveable under the fiat; though, in actions of *contract*, they are in general discharged by the certificate, by reason that they follow the original debt. So that, if a creditor bring an action against a bankrupt after a fiat has issued, he takes the chance of losing his costs, in case the debt should be barred by the certificate.²

Where judgment after bankruptcy.] It was for some time held, and the doctrine was recognized by many decisions,³ that the judgment in all actions, when signed, related back to the verdict; and that the costs *de incremento* upon the judgment, according to a fair and equitable relation of law, became annexed and consolidated with those assessed by the jury, and might be consequently proved as a debt under the commission, if the debt was prior to the bankruptcy.

¹ It will be observed, that this section takes no notice of a judgment obtained by a DEFENDANT in any action or suit; though it was no doubt intended, that the costs of a nonsuit, or a judgment, in the defendant's favour, occurring before the bankruptcy, should be equally proveable with those of a judgment for the plaintiff. The provision contained in this section, also, as to the proof of costs *at law*, seems to be wholly unnecessary; for such costs must always be *taxed*, *before* final judgment is obtained; and were,

indeed, always proveable, when judgment was recovered before the bankruptcy, *Gulliver v. Drinkwater*, 2 T. R. 261.

² *Willett v. Pringle*, 2 N. R. 190; and see *Blandford v. Foote*, Cowp. 138. *Lewis v. Piercy*, 1 H. B. 29; and see post, 278.

³ *Aylett v. Harford*, 2 Bl. 1317. *Graham v. Benton*, 1 Wils. 41. 2 Str. 1196. More accurately reported in 14 East, 200, note (a). *Longford v. Ellis*, 1 H. B. 29, note. 14 East, 202, note. *Ex parte Simpson*.

The authority of these cases, as far as they related to the right of PROOF, was first doubted by Lord Eldon, in a case where both the verdict and the judgment occurred after the bankruptcy, and in which he decided that, notwithstanding the costs in such a case might be discharged by the certificate, they were, nevertheless, not proveable under the commission.¹ In delivering his opinion upon this occasion, his lordship intimated, that, in the decision of the cases above referred to, (all of which had been cited in the argument) the courts had not presented to their view, two former decisions of great authority,² in which a different principle was established. A case was afterwards sent for the opinion of the court of King's Bench; and, after full consideration of all the previous authorities, that court finally determined that, although a *verdict* be obtained *before* an act of bankruptcy, yet, if final judgment be not signed till *afterwards*, the costs could not be proved under a commission.³ And a similar decision has been since come to on this point by the court of Common Pleas, where Lord C. J. Gibbs observed, that the question could not be tried better, than by asking, whether an ACTION can be brought upon a verdict, before judgment is signed.⁴

A distinction, however, has been taken in these cases between a verdict in an action on a *contract*, and a verdict in an action on a *tort*; ⁵ it having been decided, that, where in an action *ex contractu* the verdict was before bankruptcy and the judgment afterwards, the costs *de incremento* were incorporated with the existing debt by the verdict, though not ascertained in amount until the judgment, and were therefore proveable under a commission,—but that in *tort* there is no debt whatever, with which the costs can be incorporated, until the judgment.⁶ And although the verdict in an action *ex contractu* may be subject to a reference, by which it is directed that the costs of the action shall abide the event of the award, and the award is not made in favour of the plaintiff until after the defendant becomes bankrupt; the costs were nevertheless proveable under the fiat.⁷ It has

¹ Ex parte *Hill*, 11 Ves. 646.

² Ex parte *Todd*, cited 3 Wils. 270. 11 Ves. 651. *Walter v. Sherlock*, cited *ibid*.

³ Ex parte *Charles*, 14 East, 197.

⁴ *Walker v. Barnes*, 1 Marsh. 346. 5 Taunt. 778.

⁵ This distinction appears to have been first acted upon by Sir J. Leach,

though it was previously approved of by Lord Eldon in *ex parte Hill*, and was also taken in argument in *Longford v. Ellis*, 1 H. B. 29.

⁶ Ex parte *Poucher*, 1 G. & J. 385. Ex parte *Parkinson*, *ibid*. 386, note (a).

⁷ Ex parte *Helm*, Mont. & M. 70.

also lately been decided, that a judge's order for the payment of the debt and costs is in this respect equivalent to a verdict, and that although judgment is not signed, nor the costs taxed until after the fiat issues, the plaintiff can prove for both debt and costs.¹ The above distinction, however, between the two different kinds of actions above mentioned does not seem to have been much attended to by the court of Exchequer in an action for damages on a *tort*, in which a verdict was taken subject to a reference, and in which, though the award was not made, nor the judgment entered up until after the defendant's bankruptcy, it was decided, that both costs and damages could be proved under the commission,²—a decision, which is utterly at variance with the principle previously laid down by Lord Eldon, and the courts of King's Bench and Common Pleas, in the previous cases of *ex parte Hill*, *ex parte Charles*, and *Walker v. Barnes*. The judgment, indeed, in this case, though not entered up until after the act of bankruptcy, was *entitled* as of the PREVIOUS term,³ and this *may* probably have been taken into consideration by the court, though it is not stated as a reason for the judgment; for on no other principle, is it apprehended, can this decision be supported.

Another line of distinction, also, has been adopted by the court of King's Bench, where it has been holden, that, where the judgment in an action of tort was obtained *before the issuing of the commission*, though not until after the act of bankruptcy, the judgment for both damages and costs may then be proved as a debt *bonâ fide contracted* before the issuing of the commission, within the meaning of the 46 Geo. 3, c. 135, s. 2, and consequently, within the 47th section of the 6 Geo. 4, c. 16,⁴ which adopts the same provisions. This last decision is also consistent with the provisions of the 2 & 3 Vict. c. 29.

Upon a careful review of all the above cases, the following rules seem to be clearly deducible from them:—

1st. Where the *verdict* is not obtained until *after the act of bankruptcy*, the costs can in no case be proved, whether the action is on a contract, or in tort; unless, indeed, the verdict can be said to be a *dealing* or *transaction* with the bankrupt, within the meaning of the 2 & 3 Vict. c. 29.

2nd. Where the *verdict* is *before the bankruptcy*, and

¹ *Ex parte Ferris*, 2 M. D. & D. 746.

² *Beerton v. White*, 7 Price, 209.

³ And see, as to the relation back of a judgment to the first day of the

term in which it is *signed*, the case of *ex parte Birch*, 4 B. & C. 880.

⁴ *Robinson v. Vale*, 2 B. & C. 762.

⁵ *Dowl. & R.* 430. *Ex parte Birch*, 4 B. & C. 880.

judgment is obtained *before the issuing of the fiat*—though not till after the act of bankruptcy—then the costs in actions both of contract, and of tort, may be proved, as a debt contracted before the issuing of the fiat, provided the creditor, when judgment was obtained, had no notice of the act of bankruptcy.

3rd. Where the action is on a *contract*, and there is a *verdict before the issuing of the fiat*, then, although judgment be not obtained until *after the issuing of the fiat*, the costs are proveable, as being consolidated with the original debt by the verdict, though not ascertained until the judgment.

4th. But where the action is in *TORT*, and the judgment is not obtained until after the issuing of the fiat, then, as there is no debt whatever with which the costs can be incorporated until the judgment, the costs in this case cannot be proved.

Costs of a defendant.] With respect to costs upon a judgment of nonsuit, the statute, as has been already observed,¹ is wholly silent, making no provision whatever for the proof of a defendant's costs, whether on a judgment of nonsuit, or judgment after a verdict. It was indeed formerly determined, that where the nonsuit was *before the bankruptcy* of the plaintiff, the costs might be proved, though the judgment was not obtained till afterwards,—on the ground that the costs related back to the nonsuit,² by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be only found in two of the cases, which were impugned by Lord Eldon in *ex parte Hill*,³ and which seem to have been overruled by the above case of *ex parte Charles*.⁴ And it has been moreover since decided, that, where a defendant obtained a *verdict*, and the plaintiff became bankrupt before judgment was signed, the costs could not be proved under the commission, on the principle that no debt arose in such a case until judgment was signed.⁵ But in a subsequent case, where the judgment on a nonsuit was entered up *before the commission* issued against the plaintiff, though not until *after* the act of bankruptcy, the costs were held to be proveable (in conformity with the principle which

¹ Ante, page 274, note 2.

² *Hurst v. Mead*, 5 T. R. 365.

³ *Watts v. Hart*, 1 Bos. & P. 134.

⁴ 11 Ves. 646.

⁵ 14 East, 197.

⁶ *Walker v. Barnes*, 5 Taunt. 778.

1 Marsh. 346. *Bire v. Moreau*, 4 Bing. 57. *Brough v. Adcock*, 7 Bing. 650. And see *Hanwell v. Thorogood*, 7 B. & C. 705, where Lord Tenterden founded his judgment upon the law as above stated.

governed the court of King's Bench in the above case of *Robinson v. Vale*) as being a *debt contracted* before the issuing of the commission.¹

There are several cases, as has been already observed,² where costs may be discharged by the certificate, and yet not proveable under the fiat;³ though formerly the right of proof was considered co-extensive, in every case, with the effect of the certificate. Thus, the costs of all proceedings upon an action of *contract*, which (for want of a previous verdict) cannot be proved, are, nevertheless, barred by the certificate, as following the original debt.⁴ So, if a judgment recovered before the bankruptcy be revived by *scire facias* after the bankruptcy, it has been decided, that the bankrupt's certificate delivers him from the costs of the *sci. fa.*, as well as from the original judgment; but it does not follow, that the costs of the *sci. fa.*, which have been incurred by the act of the creditor in reviving the judgment, can be proved⁵ under the fiat. It has been also decided, where a judgment is obtained *before* the bankruptcy,—if the defendant *after* his bankruptcy bring a writ of error to reverse it, and the judgment be affirmed—the costs of the writ of error relate back to the judgment, and are barred by the certificate.⁶ But it would seem to follow, in this case, that the costs could likewise be proved; for the plaintiff, having in reality, though not effectually, obtained judgment *before the bankruptcy*, the case seems to fall within the above clause of the statute, which enables a plaintiff to prove for the costs *incurred in obtaining judgment* against any person who shall afterwards become a bankrupt, though not taxed at the time of the bankruptcy; and a judgment of affirmance in error is equivalent to pronouncing judgment⁷ in the original action. And where the judgment is not obtained until after the bankruptcy, in an action for a *debt*, and the defendant brings a writ of error which is nonprossed,—as the defendant is held in such case to be discharged by his certificate from the costs,⁸ it is apprehended, that the costs might be likewise proved under the fiat; for, the action being on a *contract*, they may be considered as incorporated with the original debt, according to the principle of the foregoing cases; and being incurred, moreover, by the act of bankrupt, and not by

¹ *Holding v. Impey*, 1 Bing. 189.

² Moore, 614.

³ Ante, 274.

⁴ Per Lord Eldon, 11 Ves. 649.

⁵ Ex parte Poucher, ante, 276.

⁶ *Phillips v. Brown*, 6 T. R. 282.

⁷ Ibid.

⁸ 3 M. & S. 326.

⁹ *Scott v. Ambrose*, 3 M. & S. 326.

the act of the plaintiff, it would be unreasonable to hold, that the bankrupt should be discharged from them, and the plaintiff be at the same time unable to prove them under the fiat.¹ And when the trial of a cause was postponed by an order of *nisi prius*, on the defendant's application, on the terms of his paying the costs of the day; and the order of *nisi prius* was made a rule of court, and the costs were taxed, after which the defendant became bankrupt; it was held, that he was discharged by his certificate from these interlocutory costs, as an *ascertained claim or demand*, before the bankruptcy.²

Before the 6 Geo. 4, c. 16, s. 58, the costs of a suit in chancery not taxed till after the bankruptcy, though the order for taxation was made before, could not be proved under a commission,—it being held that it was the taxation which constituted the demand,³ and that that could not relate back to the order. But now, by reference to the above section of the statute, it will be seen, that where the order or decree is obtained before the bankruptcy, the costs of obtaining it may be proved, though not taxed till after the bankruptcy. Whether the words of the section will include the costs of a suit directed to be paid by an *award*, where there is *no order or decree* for the reference, remains to be decided.⁴

SECTION XX.

Damages.

(And see ante, "*Judgments*" and "*Costs*.")

Where damages are contingent and uncertain, as in *all* cases of *tort*, and also in *many* cases of a demand founded upon *contract*, as where the damages remain to be inquired into, or where damages *may* only by possibility arise on a stipulation not previously broken,—they cannot in either case be proved under a fiat.⁵ For the 56th section of the act, which we have already considered,⁶ would not, it is appre-

¹ The most consistent rule, as it appears, would be, when the costs are thus occasioned by the *bankrupt* bringing a writ of error *after the bankruptcy*, to hold in such case, that the costs should neither be proveable under the fiat, nor discharged by the certificate, as being a debt contracted by the bankrupt after the bankruptcy.

² *Jacobs v. Phillips*, 4 Tyr. 652.

³ *Ex parte Sneaps*, C. B. L. 193.

⁴ See *Rex v. Davis*, 9 East, 318, and *ex parte Kemshead*, 1 Rose, 149.

⁵ *Utterson v. Vernon*, 4 T. R. 571.

⁶ Ante, "*Contingent Debts*."

hended, meet the last of these cases; that section applying solely to proof of a *debt* (that is, a *sum certain*) payable on a contingency, and not to an *uncertain sum* payable upon an uncertain event.

Cases of tort.] With respect to cases of *tort*: damages claimed for an assault and battery,¹ or for slander,—or even in trespass for mesne profits,² in which the rent may not be the only measure of damage,—or damages in an action of trover,³ if they are incapable of being liquidated,—can in no case be proved under a fiat; for, in each of these cases, the claim of the party amounts in law to nothing more than an alleged cause of action against the bankrupt, and a jury can only determine the amount of the damages he is entitled to, or whether, in fact, he shall have *any* damages at all. In one case, indeed, it was holden, that damages (though ascertained by the verdict of a jury before the act of bankruptcy) were not proveable, any more than the costs, if final judgment was not signed until after the bankruptcy.⁴ But it has been since determined, that when the judgment was obtained *before the issuing of the commission*, the damages were then proveable, as constituting a debt *contracted bonâ fide* within the meaning of the 47th section of the 6 Geo. 4, c. 16.⁵ And it has been also holden, that, though the judgment was not actually signed until three days *after* the commission issued, yet—as a judgment relates back to the first day of the term in which it is signed, which in this case was before the issuing of the commission—that both damages and costs could be proved.⁶

In considering this branch of the subject, there seems to be a distinction, between the right to prove *damages* already ascertained by the verdict of a jury,—and the right to prove merely upon the JUDGMENT, or for the *costs*. For, though a judgment is not proveable, nor costs in many cases,⁷ unless the judgment is obtained before the issuing of the fiat,—yet, as a *verdict* is *primâ facie* evidence of a debt,⁸ and is, at least, a guide to the commissioner to measure the amount of the damages which the creditor claims, it should seem, that when proof is offered merely for *damages* (without any claim for costs) by reason of a *verdict* before the bankruptcy, the

¹ *Waller v. Sherlock*, 3 Wils. 272.

² *Goodtitle v. North*, Doug. 584.

³ *Parker v. Norton*, 6 T. R. 695.

⁴ *Buss v. Gilbert*, 2 M. & S. 70.

⁵ *Robinson v. Vale*, 2 B. & C. 762. 4 Dowl. & R. 430.

⁶ *Ex parte Birch*, 4 B. & C. 880.

⁷ *Ante*, 275.

⁸ *Per Lord Eldon*, 1 Rose, 195.

commissioner in such a case has a discretionary power to inquire into the propriety of the verdict, and to admit the creditor to prove for such damages.¹ For it is the *uncertainty* only of the amount of the damages, which prevents their being proved under a fiat; a reason which no longer holds, when they are already liquidated and ascertained. Thus, where an action was brought, for the seduction of the plaintiff's daughter, and was compromised before judgment by the defendant giving the plaintiff two promissory notes in satisfaction of the damages,—it was held, that the notes were proveable under a commission against the defendant, as being liquidated damages assessed between the parties.² So, even in an action of trover, if the demand can be liquidated, it can be proved.³

In all cases, too, where a creditor, having a right of action for a TORT, is entitled to waive the tort and bring an action as for money had and received, or upon a contract for a given sum, he may prove his demand⁴ under a fiat. Therefore, where goods have been paid for, but not delivered by the bankrupt⁵ according to agreement; or where money is levied by the sale of goods under an execution which is afterwards set aside;⁶ or where a bill of exchange, having been entrusted to the bankrupt to receive payment when due, is discounted by him, and the proceeds applied to his own use;⁷ or where the bankrupt pledges a debenture for a debt of his own, which had been deposited with him for a special purpose;⁸ or where money is embezzled by a bailiff upon a sale of goods under a distress for rent;⁹—in all these cases, as the amount of the creditor's demand against the bankrupt is capable of being ascertained without the intervention of a jury, and the creditor can *safely swear* to it, he is entitled to prove it under the fiat. But if the creditor, in any of these cases, insists upon his claim for the *consequential damage* arising from the tortious act of the bankrupt, then he cannot be admitted to prove; for the damages so claimed are uncertain and contingent, and can only be estimated by a jury.

Cases of contract.] In regard to claims founded upon *contract*, such as a demand either for goods sold, or for work

¹ Per Lord Eldon, 1 Rose, 195.

² Ex parte *Mumford*, 15 Ves. 290.

³ Per Buller, J. Doug. 168.

⁴ *Wright v. Hunter*, 1 East, 30.

⁵ Per Buller, J. in *Utterson v. Vernon*, 3 T. R. 548.

⁶ *Ibid.*

⁷ *Parker v. Norton*, *supra*.

⁸ *Johnson v. Spiller*, Doug. 167.

⁹ Ex parte *Dobson*, 7 Vin. Ab. 74.

and labour, where there is no agreement as to the price, and which would be recoverable at law in an action on a *quantum meruit*,—the demand, though sounding in damages, can be proved, because it can be easily ascertained, and the creditor can have no difficulty in swearing to the amount. So, where a bond (as we have before seen¹) is given to replace stock on a *certain day*, and the bond is forfeited before the bankruptcy, the damages for not replacing the stock can be proved, because they can be easily estimated,—the amount proveable in this case, being the value of the stock at the date of the fiat, together with the amount of the dividends receivable before the bankruptcy.² And where navy bills were deposited with a firm, who gave an accountable receipt for them, and one of the firm became bankrupt, the owner of the bills was held entitled to prove for the value of them on the day of the deposit.³ Where teas were sold to be paid for at appointed days, and were left as a pledge for full payment with the vendor, who, in case of non-payment, was to be at liberty to resell and charge the loss to the original purchaser, who became bankrupt, not having paid the purchase money at the appointed time, and the vendor sold the teas at a loss, it was held that he could prove for the residue of the original purchase money.⁴ Not only, indeed, may the creditor prove his demand against the bankrupt in any of these cases, but he is now in fact compelled to do so, with a view to his own security; for all demands arising from any breach of *contract*, which can with any certainty be liquidated, are discharged when the bankrupt obtains his certificate.⁵

But unliquidated damages, though arising on a *contract*, cannot be proved, if there is any *uncertainty* in the mode of estimating them. Thus damages sustained from a breach of covenant, in not building a certain number of houses within a given time,⁶ or for not accepting goods contracted for by the bankrupt, and agreed to be delivered at a certain price, at a certain time occurring after the bankruptcy;⁷ in not having full power and authority to sell a ship,⁸ or in not indemnifying the assignor of a lease from the covenants contained in it,⁹

¹ Ante, 236.² Ex parte *Leitch*, C. B. L. 149; and see ante, 236.³ *Bromley v. Child*, 1 Atk. 258.⁴ Ex parte *Moffatt*, 1 M. D. & D. 282, 2 M. D. & D. 170.⁵ *Forster v. Surtees*, 12 East, 605.⁶ *Bannister v. Scott*, 6 T. R. 489.⁷ *Boorman v. Nash*, 9 B. & C.145. *Green v. Bicknell*, 3 Nev. & P. 634.—8 Ad. & E. 701. And see post.⁸ *Hammond v. Toulmin*, 7 T. R. 612.⁹ *Mayor v. Steward*, 4 Burr. 3439. *Ludford v. Barber*, 1 T. R. 86. *Auriol v. Mills*, 1 H. B. 433.

4 T. R. 94.

have been in each of these cases held not proveable under a commission. So where, upon a loan of Cuba bonds by a customer to his bankers, the latter engaged to replace them within three months, and after the expiration of that period, the customer consented to an exchange of other securities for those previously deposited, without any new stipulation as to the period of redemption, and the bankers became bankrupt; it was held, that, the time for replacing the bonds becoming indefinite, the bankers were not bound to replace them, until requested to do so, and that no such request having been made before the bankruptcy, the customer had no right to prove for the amount of the bonds under the fiat, and that the 6 Geo. 4, c. 16, s. 56, as to the proof of contingent debts, did not apply.¹ In all the above cases a variety of circumstances must be taken into consideration, which may either increase, or mitigate, or even sometimes altogether excuse the damages, and which it is the peculiar province of a jury to determine. And where there is even a *penalty*, or specific sum of money made payable in a bond of indemnity, or covenant to secure performance—as upon a covenant in a lease not to plough up ancient meadow, or a penalty, which is even specified to be a liquidated penalty, for not supplying a creditor with so many pieces of cloth per week²—the penalty, it has been held, cannot be proved as a debt; as it is not the *measure*, but *only limits the extent*, of the damages to be claimed in case of a breach.³ But contracts to deliver stock on a certain day are an exception to the above rule.⁴

SECTION XXI.

Sureties.

1. *As to the Rights of a Creditor against the Bankrupt Surety.*
2. *As to the Rights of the Solvent Surety against the Bankrupt Debtor, or Co-Surety.*

1. *As to the Rights of the Creditor against the Bankrupt Surety.*

Where a surety has become bankrupt, the right of the creditor to prove under the fiat has been considered to depend

¹ Ex parte Eyre, 3 M. D. & D. 12.

² 3 Wils. 270. *Taylor v. Young*, 3 B. & A. 521.

³ Ex parte Maclean, 2 M. D. & D. 564.

⁴ *Green v. Bicknell*, 3 Nev. & P. 634.; 8 Ad. & E. 701.

upon whether the engagement of the surety was absolute, or conditional, at the time of the bankruptcy. For the 49 Geo. 3, c. 121, s. 8, which first gave relief to the surety *as a creditor*, has been held not to apply to cases, where the *surety himself becomes bankrupt*;¹ and there is nothing contained in the corresponding section of the 6 Geo. 4, c. 16, which alters the law in this respect. Such cases, therefore, must be considered as falling within the rule respecting contingent debts contained in the 56th section of the statute.²

Where the engagement absolute.] If the engagement of the surety be *absolute*, the creditor has a right of course to prove, independently of the power given by the 56th section,—as where the surety enters with the principal into a joint and several bond payable by instalments, and before the first instalment falls due, the surety becomes bankrupt;—for in such a case the surety himself is considered as a principal.³ And where the first instalment is not paid by the principal until a month after it becomes due, and the surety afterwards becomes bankrupt, the bond is proveable against the estate of the surety.⁴ But if in this case the principal, as well as the surety, become bankrupt, and the obligee first proves his whole debt against the principal, and receives a dividend, he must deduct the amount of the dividend, and prove against the surety only for the residue.⁵ So, indeed, where the engagement is not decidedly absolute,—as where the creditor receives a bill of exchange from a surety, to secure the payment of goods sold to the principal, which are afterwards partly paid for by the principal,—the creditor can only prove against the estate of the surety, the sum remaining due for the goods,⁶ and not the full amount of the bill. And where A., previous to his bankruptcy, guaranteed B. and Co. against any loss, on account of the non-payment of an instalment by certain joint debtors of B. and Co.; and one of the joint debtors becoming bankrupt, B. & Co., under an order for the proof of joint debts under his separate commission, proved the amount of the instalment, and received a dividend,—it was ordered, that the benefit of the future dividends should be sold, and the produce paid to B. and Co., and that the monies so received by them, together with the amount of the

¹ Ex parte *McMillan*, Buck. 287.

⁵ Ex parte *Wildman*, 1 Atk. 109.

² See ante, "*Contingent Debts*."

2 Ves. 113. *Martin v. Brecknell*,

³ *Brooks v. Lloyd*, 1 T. R. 17.

2 M. & S. 39.

And see *Penny v. Foy*, 8 B. & C. 11.

⁶ Ex parte *Reader*, Buck. 381;

⁴ *Skinner's Company v. Jones*, 3 Bing. N. C. 481.

and see ante, 249.

former dividend, should be deducted from the instalment, and that B. and Co. might then prove for the difference under A.'s commission.¹

Where contingent.] If the engagement of the surety be only *collateral*, and depending on a contingency, then, unless the contingency has happened before the application to prove, the debt cannot be proved under a fiat against him; unless, indeed, it can be considered such a contingent debt, as that a value can be set upon it by the commissioners under the 56th section. It will be advisable, perhaps, to consider some of the decisions on this head, notwithstanding they occurred before the 6 Geo. 4, c. 16, the better to inquire how far the words of that statute as to contingent debts will be applicable to cases of a similar nature.

Where a surety joined in a bond, conditioned that the principal should repay the money within twenty days after the expiration of five years, in case he should so long live and enjoy the benefit of the loan; and if he died before, then that his executors, &c., should repay it within three months after his death,—the bond in this case was held not proveable under a commission against the surety, unless there had been a previous forfeiture by the breach of any of the conditions.² So, where J. S. agreed to pay a sum of money to A. by instalments, and B. covenanted with A., that in case the said sum, or any instalment thereof, should not be paid to A. at the times, and in the manner, provided for by the articles, B. would upon demand pay to A. the said sum, or so much thereof as should not be paid at the said times, &c., and no instalment became due until after a commission of bankrupt issued against B.;—it was held in this case, that A. could not prove under the commission;³ though now, it is apprehended, under the 6 Geo. 4, c. 16, s. 56, he might have proved for any instalment *already due*, notwithstanding it did not become due until after the issuing of the commission. So, where a surety, in consideration of a premium, gave a promise in writing to be answerable for the due payment of a note of hand of a third person, and before the note was due became a bankrupt,—it was held, that the creditor was not entitled, upon such an undertaking, to prove the amount of the note under the commission.⁴ But if in this case, also, the note had been due, and default had been made in the pay-

¹ *Ex parte Reid*, Buck. 239.

² *Alsop v. Price*, Doug. 160.

³ *Hoffham v. Foudrinier*, 5 M. & S. 21.

⁴ *Ex parte Adney*, Cowp. 460; and see *ex parte Gardom*, 15 Ves. 286.

and see *Gaskell v. Lindsay*, 2 Rose, 469. 1 Holt. N. P. Rep. 212.

ment of it before the application to prove it against the surety, the creditor would, under such circumstances, be admitted now to prove it as a contingent debt; as will be clearly seen from the following cases, which have been decided since the 6 Geo. 4, c. 16.

Thus, where C., in consideration of A. allowing B. to draw upon him and accepting such drafts, guaranteed to A. the payment of the amount of all such acceptances, and C. became bankrupt before the acceptances were due; it was held, that, after they became due, and B. had neglected to provide for them, A. was entitled to prove the amount against C.'s estate.¹ Accordingly where A. advanced 2000*l.* to B. to be repaid on a day certain, which was secured by the bond of C., conditioned that if B. made default in payment on the day named, C. should pay within one week, and B. made default after C. had become bankrupt, it was held that the debt was proveable under the commission against C.² So, also, where C. and Co., before their bankruptcy, guaranteed to A. the payment of 300*l.* for the erection by him of a sugar mill for D, on the production of a certificate by an engineer, that the mill was erected according to the terms of a certain specification; and A. produced a certificate of the erection of the mill, stating however a deviation from the original plan with the consent of D.; after which C. and Co., without making any objection to such deviation, informed A. it was not in their power to pay the money; it was held, that it might prove the 300*l.* over the fiat against C. and Co.³ But the instalments of an annuity, for the payment of which a bankrupt is surety only, and which he consents to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety.⁴

Where a man becomes *bail* for another, and before he is fixed, is made a bankrupt,—or if he is bail in error, and becomes bankrupt before judgment is affirmed;—the debt in each of these cases, being contingent at the time of the bankruptcy, could not formerly be proved against him.⁵ But now, if judgment be affirmed in error, or the bankrupt be fixed as bail in the action, *before the application to prove*, the time of the bankruptcy would make no difference in the right of proof. Where A. and B. enter into a joint promissory note for the

¹ Ex parte *Myers*, 2 D. & C. 251; ex parte *Simpson*, 3 D. & C. 792.

² Ex parte *Lewis*, Mont. & M. 426.

³ Ex parte *Ashwell*, 2 D. & C. 281.

⁴ *Thompson v. Thompson*, 2 Bing. N. C. 168, 2 Scott, 266.

⁵ *Hockley v. Merry*, 2 Str. 1043.

debt of B., and A. becomes bankrupt, the payer may prove the amount of the note against the estate of A., unfettered by the rule that applies in the case of partnerships, where it must appear that there is no solvent partner and no joint estate.¹

Where surety discharged.] The discharge of the principal debtor is, in general, a discharge of the surety; and an agreement by the creditor to take a collateral security from another person in full of his demand, operates to the same effect.² But the discharge of a surety by the creditor has not the effect of discharging the principal, nor does it operate as a discharge of the co-surety. Therefore, where a promissory note was made by a principal and three sureties, and two of the sureties and the principal became bankrupt, and the holder of the note proved the amount under each commission, and afterwards received a composition of 4*s.* in the pound from the third surety,—it was held, that this was not a discharge of the maker of this note, or of either of the two other³ sureties. It is competent also for a creditor, executing a deed of composition with the principal, to reserve his remedy against the surety, by a stipulation to that effect in the deed of composition.⁴ And a creditor holding a bill of exchange as a security from three partners, though he takes the notes of one of them as a collateral security, without the knowledge of the other partners, retaining the original security in his hands, does not by so doing discharge the other partners.⁵

Where A. agreed to be responsible to B. for the due payment to him by C. of 24,000*l.* by yearly instalments of 1200*l.*; and B. afterwards agreed to accept six joint notes of A. and C. for 2000*l.* each, and delivered up the original agreement to C.; but only one of these notes was paid; it was held that B. could not prove, under a fiat against A., the original debt of 24,000*l.*, but only the amount of the five notes remaining unpaid.⁶

Where a surety enters into a bond with the principal, conditioned for the performance of covenants in a lease, the surety is still liable, though the principal is discharged by bankruptcy and certificate from the covenants contained in it, under the 75th section of the 6 Geo. 4, c. 16.⁷ And it

¹ *Ex parte Croxfield*, 1 Dea. 405.

⁵ *Bedford v. Deakin*, 2 Star.

² *Lewis v. Jones*, 4 B. & C. 178.

⁶ *Ex parte Powell*, 1 Dea. 378.

³ *Ex parte Gifford*, 6 Ves. 805.

⁷ *Inglis v. Macdougall*, 1 Moore,

⁴ *Ex parte Carstairs*, Buck. 560.

196.

Ex parte Glendining, *ibid.* 517.

makes no difference as to the liability of the surety, that he was a party to the lease, and covenanted with the lessor for payment of the rent; that is, as far as regards his liability up to the actual time of the surrender of the lease by the assignees or the bankrupt, to the lessor.¹

It seems to be pretty well settled now, in courts of law at least, that an agreement to pay, or be answerable for, the debt of another, must, according to the construction of the 4th section of the statute of frauds,² not only be in writing, but must also contain the *consideration* for the promise, as well as the promise itself.³ Some doubts upon this point are reported to have been expressed by Lord Eldon, but they seem to be merely *obiter dicta*, and to have occurred moreover in cases where the consideration did, in fact, sufficiently appear in the agreement.⁴ Notwithstanding, also, the attention of the judges has been especially called to a consideration of these doubts in two subsequent cases, both the courts of King's Bench and Common Pleas have confirmed the doctrine laid down in *Wain v. Warlters*.⁵

2. As to the Rights of the Solvent Surety against the Bankrupt Debtor, or Co-surety.

There have been many conflicting decisions respecting the right of the surety to prove a counter-security against the principal debtor, where the surety had not himself been actually obliged to pay the money before the bankruptcy of the principal. At one time (as we have before seen in the case of a bill or note⁶) it was holden, that if he had taken a counter-security, which was payable *absolutely* at a day certain,—then, though the principal had become bankrupt before the counter-security was payable, and before the surety had either paid, or been called upon to pay his engagement to the creditor, the surety was permitted to prove his counter-security immediately under the commission; upon the principle, that the counter-security was an absolute debt at law, for which there was a sufficient consideration created by the liability of the surety.⁷ In subsequent cases it was holden, that the

¹ *Tuck v. Fyson*, 6 Bing. 321.

² 29 Car. 2, c. 3.

³ *Wain v. Warlters*, 5 East, 10. *Saunders v. Wakefield*, 4 B. & A. 595. *Jenkins v. Reynolds*, 3 B. & B. 14.

⁴ *Ex parte Minet*, 14 Ves. 190. *Ex parte Gardom*, 15 Ves. 286.

⁵ 4 B. & A. 595. 3 B. & B. 14.

⁶ Ante, 256.

⁷ *Rolfe v. Caslon*, 2 H. B. 570. *Ex parte Mayhewell*, cit. *ibid.* 571. C. B. L. 157. *Ex parte Beaufoy*, *ibid.* 158. *Ex parte Clanricarde*, *ibid.* 162. *Toussaint v. Martinant*, 2 T. R. 100. *Martin v. Court*, *ibid.* 640. *Hodgson v. Bell*, 7 T. R. 97.

surety could not prove upon such counter-security, unless he had taken up his own bills, or had paid the original debt (if upon bond) so that the bankrupt's estate, before it was charged with the claim of the surety, might at all events be exonerated from the original debt.¹ But where the counter-security was only conditional, such as a bond to indemnify the surety against his being called upon to pay the money, and there was no breach of the condition before the bankruptcy, it was there held, that the surety could not prove; as the debt in that case was only contingent.² Though at the same time, where the indemnity bond was forfeited *before* the bankruptcy, the surety was then considered entitled to prove his bond, notwithstanding he had paid no part of the sum (for which he had become surety) until after the bankruptcy.³

In all cases, however, where the surety had no counter-security from the principal, or nothing but a mere undertaking of indemnity, it seems to have been the uniform decision of the courts, that the surety then, though he had made himself absolutely liable for the debt, could not prove under the commission, unless he had actually paid the debt *before the bankruptcy of the principal*; and that any payment *after* the bankruptcy only gave him a personal remedy against the bankrupt, and did not enable him to prove. And the reason of this was, that there was no existing debt between the principal and the surety, before the latter had paid the money to the creditor.⁴

These disabilities were, however, always considered to be a great hardship upon the surety, when he was obliged to pay the money after the bankruptcy of the principal; and, therefore (as has been already observed⁵) the courts held, in cases when the creditor had already proved under the commission, that the surety had an equitable right to stand in the place of the original creditor, and to receive dividends upon such proof.⁶ And if the creditor had not proved, the

¹ In re *Bowness*, C. B. L. 161. Ex parte *Pindon*, *ibid.* 149. Ex parte *Brown*, *ibid.* Ex parte *Walker*, 4 Ves. 385.

² *Martin v. Court*, 2 T. R. 640. *Crookshank v. Thomson*, 2 Str. 1159.

³ Ex parte *Cockshott*, 3 Bro. 502. *Hodgson v. Bell*, *supra*.

⁴ *Smithson v. Johnson*, Barnes, 113. *Goddard v. Vanderheyden*, 3 Wils. 262. Bl. 794. *Taylor v. Mills*, Cowp. 525. *Paul v. Jones*, 1 T. R. 599. *Kittear v. Raynes*, 1 Bro. 384.

Chilton v. Whiffin, 3 Wils. 13. *Young v. Hockley*, Bl. 839. 3 Wils. 346. *Vanderheyden v. De Paiba*, 3 Wils. 528. *Heskuyson v. Woodbridge*, Doug. 166. Ex parte *Marshall*, 1 Atk. 130. *Brooks v. Rogers*, 1 H. B. 640. *Howis v. Wiggins*, 4 T. R. 714.

⁵ Ante, 254.

⁶ Ex parte *Rynwicke*, 2 P. Wms. 89. Ex parte *Marshall*, 1 Atk. 129. Ex parte *Mattheus*, 6 Ves. 285. Ex parte *Atkinson*, C. B. L. 210.

court of Chancery would, upon a bill filed by the surety against the creditor, order the latter to prove the debt, upon the surety bringing the amount¹ of it into court. But, if the surety had paid the debt after the bankruptcy of the principal, and before the creditor had proved, in that case it could be proved by neither creditor nor surety.²

In order to avoid this circuitous mode of obtaining relief for sureties, and to put them upon a fair and equitable footing with the other creditors of the bankrupt, it was (as has been before stated under the section relating to bills of exchange)³ first provided by the 49 G. 3, c. 121, s. 8, which provision has been somewhat extended by the 6 Geo. 4, c. 16, s. 52, that any person, who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, or bail for him either to the sheriff or to the action, and who shall have paid the debt, or any part thereof, in discharge of the whole debt, (although he may have paid the same after the commission issued,) may, if the creditor shall have proved his debt under the commission, stand in the place of the creditor as to the dividends, as well as to *all other rights under the commission, which the creditor possessed, or would be entitled to, in respect of such proof*;⁴ or, if the creditor shall not have proved, then the surety, or person liable, or bail, may prove his demand in respect of such payment as a debt under the commission, (not disturbing the former dividends,) and may receive dividends with the other creditors, although he may have become surety, bail, or liable as aforesaid, after an act of bankruptcy committed by the bankrupt; provided that when he became so he had no notice of any act of bankruptcy.

This section, it will be perceived, extends the right of proof to *bail*, who were held not to be included in the provisions of the 49 G. 3, c. 121.⁵ With that exception, therefore, all the cases determined under the 8th section of that statute will be applicable to the construction of the corresponding section of the 6 G. 4, c. 16.

From the wording of the above section, it would seem that the provision is intended more for the benefit of the surety, than that of the bankrupt; as it *enables* the surety merely, and does not *compel* him, either to prove himself, or to stand

¹ *Beardmore v. Cruttenden*, C. B. L. 211.

² *Ibid.*

³ *Ante*, 280.

⁴ The words in *italics*, are not in the 49 G. 3, c. 121.

⁵ *Hawes v. Mott*; 6 Taunt. 329.

² *Marsh*, 192. *Newington v. Keys*, 4 B. & A. 493.

in the place of the creditor who has proved, and receive the dividends upon his proof. And the case of *Mead v. Braham*¹ favours this construction, in which it was held, that the surety was not bound by the proof of the creditor. But where the surety receives dividends on the proof of the creditor, there he is estopped from proceeding afterwards against the bankrupt. Therefore, where a bill of exchange accepted by the bankrupt had been proved by an indorsee under the commission, who afterwards received the amount from the drawer, and the drawer then received a dividend upon the proof, and afterwards arrested the bankrupt (who had not obtained his certificate) for the balance; the lord chancellor, upon the petition of the bankrupt, ordered that he should be discharged out of custody at the suit of the drawer.² And, as the certificate now releases the bankrupt from all claims and demands made *provable* under the commission,³ it follows, that the above section is so far compulsory on the surety, that in all cases where he *might* have proved against the bankrupt, the certificate will be a bar to any action brought afterwards by the surety.

Having already fully considered the right of proof by sureties on bills and notes,⁴ as well as that of sureties for the payment of annuities,⁵ it will be sufficient on the present occasion to confine our attention to those cases, which involve the rights of sureties on *other instruments*.

Where a surety joined in a bond to a banker for 10,000*l.*, for payment within two months after notice of every sum of money, which the obligee should at any time pay or advance on account of the principal, by payment of or discounting drafts, bills, &c.,—and the principal conveyed an estate to the surety as an indemnity, and afterwards became bankrupt, upon which the obligee proved under the commission a debt of 20,000*l.* due from the bankrupt upon the balance of the standing account; the surety in this case, upon payment of the 10,000*l.*, was held entitled to the benefit of such proof, to the amount of the difference between the 10,000*l.*, and the value of the proceeds of the sale of the estate.⁶ So, where a surety had entered into a bond to the king, for the payment by the bankrupt of the duties received by him as distributor of stamps, and after the bankrupt had obtained his certificate,

¹ 2 M. & S. 91; and see ante, 152, and *Townend v. Downing*, 14 East, 565.

² Ex parte *Lobban*, 17 Ves. 334.

³ Section 121; and see *Vansand v. Crosbie*, 8 Taunt. 550.

⁴ Moore, 602. 3 B. & A. 13. *Westcott v. Hodges*, 5 B. & A. 12.

⁵ See ante, 280, et seq.

⁶ Ante, 258.

⁷ Ex parte *Rushforth*, 10 Ves. 409.

the surety was obliged to pay a sum of money due to the crown; it was held, that the surety could not sue the bankrupt for the amount so paid, as he might have proved it under his commission.¹ In this case it was urged, that the statute did not contemplate the case of a surety in a bond to the king, but only to a common creditor, who might, or might not, prove under the commission, whereas there was no instance of the *crown* proving under a commission: but the court decided, that, in order to bring the case within the statute, it was not necessary that the principal creditor should be enabled to prove, or that the bankrupt should be discharged by his certificate if he should not prove; and that the case did not differ from that of a surety in a bond to a private person.²

A surety, paying the debt after the proof by the creditor, is not only entitled to stand in the place of the creditor, in respect of the dividends on the proof, but also in respect of his right as to the bankrupt's certificate.³ This decision, which was upon the construction of the 49 G. 3, c. 121, s. 8, is still more fortified by the additional words introduced into the above section of the new statute, which expressly declares, that the surety in such a case should be entitled to stand in the place of the creditor as to the dividends, and *all other rights under the commission*, which the creditor possessed or would be entitled to in respect of such proof.

What case not within the statute.] It has been determined, that a surety for the payment of *rent* by a bankrupt to his landlord, where there is no rent due at the time of the bankruptcy, is not within the terms of the above section, which relates only to securities for debts of the bankrupt due *at the time of issuing the commission*; and, therefore, where a surety in such a case was obliged to pay for three years' rent, which became due *after* the bankruptcy, it was held, that he might sue for bankrupt to recover it,⁴ notwithstanding his certificate.

¹ *Westcott v. Hodges*, 5 B. & A. 12.

² *Ibid.*

³ *Ex parte Gee*, 1 G. & J. 330.

⁴ *M'Dougal v. Paton*, 2 Moore, 644. 8 Taunt. 584. Lord Henley, in his treatise on the Bankrupt Law, page 151, suggests, whether a case like the above would not be varied now, by the provision as to contingent debts, contained in the 56th section of the new statute. But it

is submitted, that unless the surety has entered into a *bond*, or other *specialty*, to the lessor for the payment of the rent, the *mere liability* to pay it (in respect of which a debt *may only by possibility be created*) cannot be considered as a *debt already contracted payable on a contingency*, so as to bring it within the 56th section. Nor does the case indeed—even if a bond were given by the surety—appear to come

But where the debt is due before the bankruptcy, the surety may prove, after he has paid the amount to the creditor; and indeed it is incumbent upon him to do so, or to compel the creditor to prove for his benefit, otherwise the bankrupt will be discharged by his certificate from all claims of the surety.¹

The statute also only extends to a party who, *at the issuing of the fiat*, was surety for the bankrupt. Therefore, where A. and B. gave a joint promissory note for money lent to them by C., and A. was obliged, *after B.'s bankruptcy*, to pay the note; it was held, that A. could not prove for a moiety of the note against B.'s estate, as he was not a surety for B., but that they were both principal debtors.²

Where bankers, with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no notice of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied; it was held, that such payment was to go in reduction of that portion of the bankers' debt, which was proveable under the fiat, and not of that which was not proveable so as to interfere with the right of proof of the surety.³

The statute, also, only applies to cases where the surety has paid the *whole debt*, or part in discharge of the whole; and not where he merely pays part in discharge of his own personal liability. Therefore, where a surety in a warrant of attorney, in order to discharge himself, paid part of the debt remaining due to the creditor (who had previously proved

within the meaning of that section; which enables the commissioners to set a value upon the debt, *before the contingency happens*, and to admit the creditor to prove for the amount. For, unless the lessor (which would seem a very preposterous case) could have a value set upon the *whole future rent* reserved in a lease to the bankrupt, and be permitted to prove the amount as a contingent debt,—it is apprehended, that a mere surety for the rent, who might never be called upon for a farthing, could still less have a value set upon his *liability*, and prove for the amount. And—if he cannot have a *value set* upon his

liability—he cannot prove, *when the contingency happens*, that he is actually obliged to pay the rent; for the statute only enables the party to prove after the contingency, “in respect of such debt,” previously mentioned in the section,—that is, such a debt as the commissioners can set a value upon before the contingency happens. See also the following case.

¹ *Jackson v. Magee*, 3 Q. B. Rep. 48.

² *Ex parte Porter*, 4 D. & C. 774.

³ *Ex parte Sharpe*, 3 M. D. & D. 490.

under the commission), and thereupon satisfaction was entered upon the record,—it was held, that, as this was not a *payment of part of a debt in discharge of the whole*, he could not stand in the place of the creditor who had previously proved.¹ If a surety, also, should after the bankruptcy of the principal, besides the debt, pay the *interest* accrued thereon *subsequent to the bankruptcy*, he will not be permitted to prove such subsequent interest; for all that is contemplated by the above enactment is, that the surety may prove as the principal creditor.²

If a surety in a bond for a bankrupt, after the bankrupt obtains his certificate, joins with him in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety, this is not equivalent to payment by the surety, so as to enable him to prove under the commission; for the transaction amounts to an entire release of the old debt by the obligee, and the surety stands afterwards in quite a different character, being no longer surety for the bankrupt's estate, but for a new obligation created subsequent to the certificate.³

As to co-sureties.] It was decided by the late vice-chancellor, that the substitution by one co-surety, without the knowledge of the other, of a different surety, in the place of that on which they were severally liable, does not give such co-surety any claim against the other, as having paid the debt, for which each was liable on the original instrument. Thus, where R., for the accommodation of C. & Co., drew on J. & Co. a bill, which they accepted, J. & Co. drawing on R. another bill, which he accepted, and both bills were indorsed to C. & Co.; and (J. & Co. before their acceptance fell due having become insolvent) the holders called upon R., as drawer, for payment,—who thereupon, for the accommodation still of C. & Co., obtained an acceptance of T. in lieu of that given by J. & Co.,—and R. proved the amount of such acceptance under a commission against J. & Co.; Sir J. Leach, under these circumstances, ordered the proof to be expunged, the dividends repaid, and the acceptance delivered up; as he considered, that the new security given by R. was one with which J. & Co. had no concern, and that their estate could not therefore be charged with the consequences of it.⁴ But Lord Eldon, when this case came before him upon appeal,

¹ *Soutten v. Soutten*, 5 B. & A. 852.

² *Ex parte Wilson*, 1 Rose, 137.

Ex parte Houston, 2 G. & J. 36.

³ *Ex parte Sergeant*, 1 G. & J. 183. 2 G. & J. 23.

⁴ *Ex parte Hunter*, 5 Mad. 165.

thought that the question was merely who were sureties, and who were principals, in these *counter-acceptances*; and that R. being the surety (as drawer) for J. & Co., as to those bills drawn by him and accepted by them, the question was to be decided by the general law between acceptors and drawers, when the drawers pay for the acceptors;—and the vice-chancellor's order was reversed.¹ And we have already seen² that one of three co-sureties for the payment of an annuity, who pays any portion of the annuity after the bankruptcy of a co-surety, cannot prove for the amount against the certificate of the co-surety.

Where partners dissolve their partnership, one partner retiring, and the other continuing the business, and covenanting to pay all the debts,—if the latter becomes bankrupt, and the retiring partner is obliged to pay any of the debts, he can prove such payment under the commission; as he is in the nature of a surety for the continuing partner.³

SECTION XXII.

Creditors by Composition.

Where a creditor agrees with his debtor to take a composition in lieu of his debt, on condition that the money is paid on a certain day, and, after failure in such payment, the debtor becomes a bankrupt,—the creditor is entitled in that case to prove for the whole of his original debt, or for such part as remains unpaid, and not merely for the amount of the composition. For the general rule in equity is, that the court will not dispense with the *point of time* in the composition of debts, as they will where it would work a forfeiture; and that where a creditor thus agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails in payment, the latter cannot⁴ be released.

Therefore, where a trader entered into a deed of composition with his creditors, by which they agreed to take 10s. in the pound on their respective debts by instalments, to be secured by his promissory notes, and the creditors

¹ Ex parte Hunter, 2 G. & J. 7. 195; and see post, title "Partners."

² Ante, p. 259, Brown v. Lee, 6 B. & C. 689.

³ Wood v. Dodgson, 2 M. & S. 529.
⁴ Sewell v. Masson, 1 Vern. 210. Eq. Ca. Ab. 28. s. 3. Heathcote v. Crookshanks, 2 T. R. 24.

covenanted that they would, as soon as such promissory notes should be paid, release and discharge the trader; and the deed also contained a proviso, that in case of default made in such payment, or if any commission should issue before the whole of the composition should be paid, then the covenants, on the part of the creditors whose debts should be so unsatisfied, should be null and void; and after the first instalment was paid, the second became due and unpaid, when a commission having issued against the trader,—Lord Eldon under these circumstances held, that the creditors were entitled to retain the first instalment, and to prove for the residue of their original debts.¹ And the same was held, where a composition deed was executed only by the major part of the creditors.² So, where a trader assigned certain book-debts, in trust to pay the creditors who should execute the deed, and covenanted that if the creditors should not, out of that fund, be paid in full within two years, he would pay the deficiency within a month afterwards; and before the end of the two years the debtor became a bankrupt,—it was held, that the creditors under the deed were entitled to have the remaining debts of the trust fund sold, and the produce divided amongst the creditors under the trust deed, *pari passu*, having regard to what had been already received; and that, after such application of the trust fund, the creditors were entitled to prove for the deficiency under the commission.³ But, if a creditor under a composition has not received his instalments before the bankruptcy takes place, and there is no fund separated for the payment of them, he cannot have them out of the bankrupt's estate, and prove the residue of the debt; but he must then come in as the other creditors,⁴ at the date of the bankruptcy.

Where, however, there is an *actual release* of the debt in the composition deed, and no default made before the bankruptcy in the payment of any of the instalments, then the creditor cannot prove for the residue of the original debt, but only for the remaining instalments. As, where a deed of composition stipulated that if the instalments should not be duly and regularly paid, the *release* thereby given by the creditors should be void, and *all* the instalments, which had become *due* before the bankruptcy, were regularly paid; in this case Lord Eldon held, that the creditor ought not to

¹ Ex parte *Vere*, 1 Rose, 281. 19 Ves. 93. And see ex parte *Bateson*, M. D. & D. 289.

³ Ex parte *Richardson*, 14 Ves. 184.

² Ex parte *Wood*, 2 D. & C. 508.

⁴ Ex parte *D'Oliviera*. Ex parte *Von Hulle*, 14 Ves. 184.

prove the residue of the debt, but only the outstanding instalments; for that, as there had been *no default* before the bankruptcy, and the bankrupt had been released from his debts, nothing whatever was then due to the creditor.¹ In a former case, however, where the bankrupt had paid the first instalment—though the creditor had waived the default in the payment of the second, by accepting two notes of hand which were not due at the time of the bankruptcy,—Lord Hardwicke thought it would be a hard case, if the creditor was not admitted to prove the whole of the remainder of his original debt.²

If a creditor, to induce another creditor to come to an arrangement with his debtor by composition, or otherwise, conceals his own debt, holding out that he is no creditor,—the party is bound by such misrepresentation, and, in case the composition take effect, will be precluded from proving his own debt.³ But when the proposed composition or arrangement does not take effect, then the party, however fraudulent his intention, will not be bound⁴ by such misrepresentation.

Where an insolvent compounded with her creditors for 13s. 6d. in the pound, but promised to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed; and after paying him in full, she contracted a fresh debt with him, and then became bankrupt,—it was held, that the payments made to the creditor above the composition of 13s. 6d. in the pound, were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting these payments.⁵

SECTION XXIII.

Rates and Taxes.

If the bankrupt's estate is in arrear for rates or taxes, the collector, or assessor, seems to be the proper person to prove the debt; and he ought, at the time of proof, to produce

¹ Ex parte *Peele*, 1 Rose, 435.

² Ex parte *Bennett*, 2 Atk. 527.

³ *Montefiori v. Montefiori*, 1 Bl.

363. *Cecil v. Plaistow*, 1 Anst. 202.

Eastabrook v. Scott, 3 Ves. 456.

Holmer v. Viner, 1 Esp. 132. Ex parte *Gardner*, 11 Ves. 244.

⁴ Ex parte *Oakley*, 1 Rose, 138.

⁵ Ex parte *Minton*, 3 D. & C. 688. And see *Cullingworth v. Lloyd*, 2 Beav. 385.

his appointment, that the commissioners may judge of the legality of it.¹

But, if the collector himself should become bankrupt, having received the taxes from the inhabitants, but not having paid the money over, one of the inhabitants in that case may be admitted to prove for himself and the rest;² and the form of his deposition should be, that neither he, nor the rest of the parishioners to his knowledge or belief, have received any security or satisfaction. It makes no difference, with respect to the right to prove against such collector, that the usual time of accounting has not arrived,—as in the case of an *overseer*, who becomes bankrupt before the expiration of his year of office, before which he cannot strictly by law be compelled to account; for the money in his hands is a *debitum in presenti*, though he may only be accountable for it *in futuro*.³ Where the bankrupt had been appointed a joint collector with another person, such person (though his co-collector) was permitted to prove for the sum due on the part of the parish.⁴

SECTION XXIV.

Army Prize Money.

By the 2 W. 4, c. 53, s. 39, the treasurer of Chelsea Hospital, or his deputy, is empowered to prove for the amount of any prize or bounty money in the hands of any bankrupt, to vote for assignees, to give discharges for dividends, and to assent to or dissent from the allowance of the certificate.

SECTION XXV.

Illegal and void Debts.

No debt, which is either illegal in its nature, as a bond given as the *premium pudoris*,—or which is made void by statute, as a debt upon an usurious contract,—can be proved under a fiat.

Where a bond, however, was given by a bankrupt for the payment of a sum of money, in consideration that the obligee would marry a servant of the bankrupt, and maintain a bastard which the bankrupt had by her, and the marriage took effect,

¹ *Lloyd v. Heathcote*, 2 B. & B. 388. 1 C. B. L. 127. 1 Mont. Dig. 143.

² *Ex parte Child*, 1 Atk. 111.

³ *Rex v. Tucker*, 5 M. & S. 508.

Contra, Rex v. Eggington, 1 T. R. 369.

⁴ *Ex parte Muggerridge*, 1 C. B. L.

128. *Ex parte Exleight*, 6 Ves. 811.

—this was held to be a good consideration, and the obligee entitled to prove the bond.¹ So, where promissory notes were given for liquidated damages in compromising an action for the seduction of the plaintiff's daughter, *per quod servitium amisit*, the notes were permitted to be proved under a commission against the maker.²

When tainted with usury.] Where a contract is originally *usurious*, it is (with only one exception) void *ab initio*, and cannot be proved by any person claiming benefit under it, notwithstanding he may be neither party, nor privy, to the usury.³ The exception alluded to is one created by the 58 Geo. 3, c. 93,⁴ by which it is declared, that no bill or note, though given for an usurious consideration, shall be void in the hands of an indorsee for valuable consideration, without notice of the usury. The rule of the court of chancery is, when a bill is filed to be relieved against a demand of usurious interest, not to make void the whole debt, but merely the excess of interest, and to compel the party to pay what is really due; but, under a fiat in bankruptcy, the assignees have a right to insist, that the whole is void upon the ground of usury. And, unless the assignees and creditors submit to the proof of what is really due, the lord chancellor has not power to order it.⁵ Where a creditor also, who had taken out execution, delivered up the proceeds to the assignees, under an express agreement that he should come in with the other creditors for the balance due to him,—it was held, that such agreement meant a *proveable* balance, and did not let in the debt, if affected by usury.⁶

By the 2 & 3 Vict. c. 37, s. 1, continued in force by 3 & 4 Vict. c. 37; 4 & 5 Vict. c. 54; and 6 & 7 Vict. c. 45, any interest may now be taken on a bill or note, not having more than twelve months to run, and upon any contract for the loan or forbearance of money, above £10, not secured upon lands, tenements, or hereditaments, or any interest therein. And, where a party lent the bankrupt 1,600*l.* on his promissory note, payable three months after date, and renewable for the same period at the option of the bankrupt, but so as not to exceed the period of eighteen months in the whole, the bankrupt undertaking to pay seven and a half per cent. interest, and three per cent. insurance; and the note was renewed

¹ *Ex parte Cottrell*, 2 Camp. 742.

² *Ex parte Mumford*, 15 Ves. 289.

³ *Lowe v. Waller*, Doug. 736.

⁴ 58 G. 3, c. 93.

⁵ *Ex parte Thompson*, 1 Atk. 125. *Ex parte Ship*, 2 Ves. 489. *Bennfield v. Solomons*, 9 Ves. 84.

⁶ *Ex parte Banglay*, 1 Rose, 168.

four times successively, and on each renewal the same rate was deducted for interest and insurance; it was held, that the transaction was protected by the act 3 & 4 W. 4, c. 98, s. 7, and was not usurious.¹ So, where a creditor advanced money to the bankrupt by discounting bills payable within three months from the date, and on the security also of the deposit of goods, and took more than five per cent. for the discount, it was held also, that this transaction was within the statute, and that the contract was not usurious.²

In some cases, where by the custom of trade a small per centage more than the legal interest is taken, in the nature of *commission*, on the discounting of bills, and as a reasonable compensation *bonâ fide* for extra trouble, such a transaction is not considered to be usurious;³ and 10s. per cent. has been held to be not unreasonable in this respect. But commission cannot be added to the amount of legal interest, for the purpose of inducing a loan of money to be made, and of recompensing it afterwards when made; for it must be always considered as an excess beyond legal interest, unless it can be ascribable to trouble and expense *bonâ fide* incurred; therefore, where there is no such trouble or expense, the remuneration cannot legally be claimed. The cases, where such commission can be claimed, are chiefly confined to the dealings of bankers, brokers, and other agents; for any charge above the legal interest by a general trader, and on one single transaction, or by persons who cannot be considered in a mercantile character, would be held a mere shift or cloak for usury.⁴

Where a warrant of attorney was given to secure the repayment of 600*l.*, with interest from a certain day, and the whole of the money was not actually advanced on that day, it was held, that the transaction was usurious.⁵ But an agreement that money borrowed should be repaid to the lender, or left in his hands as a banker, to be drawn out as the borrower wanted it,—then, although the money not being ready at the time when it is applied for by the borrower, would be a breach of the contract, yet it would not amount to usury.⁶

¹ Ex parte *Terrewest*, 4 Dea. 144, reversing S. C. 3 Dea. 590.

² Ex parte *Knight*, 1 Dea. 459.

³ Ex parte *Jones*, 17 Ves. 332.

⁴ *Rose*, 29. Ex parte *Henson*, 1 Mad. 112. *Winch*, q. t. v. *Fenn*, 2 T. R. 52 n. *Carstairs v. Stein*, 4 M. & S. 192.

⁴ *Kent v. Lowen*, 1 Camp. 178. *Auriol v. Mills*, 2 T. R. 52. *Hammersley v. Yea*, 1 B. & P. 151. *Masterman v. Cowie*, 3 Camp. 488. *Baynes v. Fry*, 15 Ves. 120. *Marsh v. Martindale*, 3 B. & P. 154.

⁵ Ex parte *Banglay*, 1 Rose, 168.
⁶ Per Lord Eldon, *ibid*.

In making out a charge of usury to defeat a debt in *bankruptcy*, it seems that, by the practice of the court, there is a much greater latitude allowed to the party making such charge, than what is permitted in courts either of law or equity. For, at law, the charge must be supported by strict rules of evidence; and, in equity, the debtor must either prove the usury by legal evidence, or have the confession of the party, and moreover cannot apply for relief, without offering to pay what is really due. But, in *bankruptcy*, it is sufficient to suggest usury in a petition supported by affidavits, merely upon information and belief, by which the party charged is in fact compelled to prove against himself; and this proceeding, also, is not for the purpose of giving him his real debt, but with the object of cutting him off from all relief.¹ This practice, which has been more than once forcibly commented upon by Lord Eldon, and which is certainly unreasonable in principle, and frequently oppressive in its effects, does not, however, appear yet to have received any alteration.

Smuggling transactions.] A debt arising from the sale of goods, bought for the purpose of being sent to India, contrary to the prohibition of an act of parliament, cannot be proved, if the party at the time of the sale knew of their illegal destination.² But a creditor, who sold the bankrupt contraband goods abroad for the purpose of being brought to England, is entitled to prove, unless he be a participator in smuggling them.³

Other illegal transactions.] So, money advanced for the furtherance and in execution of any illegal contract, cannot be proved;—as, where one member of a firm was connected with the bankrupt in an insurance partnership (which was formerly illegal,⁴) and advanced the money of the firm to the bankrupt on different policies of insurance, and the partner so advancing the money died,—it was held, that the surviving partner of the firm could not prove the amount of such advances under the commission.⁵

So money paid by bankers on unstamped checks post-dated, or issued beyond the prescribed distance by the stamp act, (55 Geo. 3, c. 184, s. 13,) cannot be proved under a fiat

¹ Ex parte *Scrivener*, 3 V. & B. 14.

² Ex parte *Moggridge*, 1 C. B. L. 187; and see ex parte *Daniel*, 14 Ves. 191.

³ Ex parte *Cavaliere*, 2 G. & J. 227.

⁴ See 5 G. 4, c. 114, by which such partnerships are now made legal.

⁵ Ex parte *Bell*, 1 M. & S. 751.

against the drawer. But letters written by a customer to a banker, living beyond the distance limited by the act, to send him money, are not drafts or orders for payment of money, within the meaning of the act.¹ So where a customer applied by letter to the agent of a branch bank, when he wanted money from time to time, and every week gave the agent an unstamped check, post-dated, for the amount of the advances during the preceding week, which the agent transmitted to the head bank, as a voucher for himself; this was held, also, not a draft or order for payment of money to the bearer on demand, within the meaning of the above act, and that the bankers were not subject to the penalties imposed by that section for paying money on an unstamped check post-dated or issued beyond the prescribed distance.² Nor are the bankers in any case liable to such penalties, unless they know that the checks were issued beyond the prescribed distance, or did not truly specify the place where they were issued. But striking balances in a running account between a banker and a customer, will not prevent the operation of the penal section of the stamp act.³

If the consideration, for which a security is given, be good in part, and bad in part,—though the security is void at law, yet in equity, and in proceedings in bankruptcy, it shall stand as to what is good. As, where a broker was employed to effect two insurances, one of which was illegal—and the principal, in consideration of the money laid out by the broker in effecting them, indorsed a bill to him, which was accepted by a third person, who became a bankrupt; the lord chancellor, though he refused to allow the broker to prove against the estate of the acceptor such part of the debt as arose upon the illegal insurance, held nevertheless that he might prove for the residue.⁴ And, where promissory notes were given by a stock-broker for the balance of an account of money advanced to him, to be employed in bargains for stock, contrary to the statute of the 7 Geo. 2, c. 8, and the broker became bankrupt,—upon a petition by the payee to prove the notes under the commission, Lord Erskine allowed proof to be made for sums admitted by the bankrupt to have been received and applied to his own use, but for no part of the amount that appeared to be made up of the profits arising from the stock-jobbing transactions.⁵ It has been considered, however,

¹ *Swan v. Bank of Scotland*, 1 Dea. 746.

² *Ex parte Bignold*, Id. 712.

³ *Ibid.*

⁴ *Ex parte Mather*, 3 Ves. 373.

⁵ *Ex parte Bulmer*, 13 Ves. 313; and see *Grey v. Fowler*, 1 H. B. 462. *Petrie v. Hannay*, 3 T. R. 418.

purely a legal question, whether transactions of this nature are, or are not, an infringement of the act of parliament; and, upon a petition to expunge the proof of a debt, which was composed of various sums of money paid by a broker for a bankrupt, in settling differences upon bargains of this description, Lord Eldon said, it ought to be put in a course for the decision of a court of law.¹

Where the bankrupt was the secretary of a coursing club, and had collected subscriptions from the members to run greyhounds, it was held, that the debt did not arise through *gaming*, and that the treasurer of the club might prove for the amount.²

A *broker* of the city of London, though he gives a bond that he will not deal on his *own account*, may nevertheless prove a debt arising out of transactions as a merchant, notwithstanding such dealings are in contravention of the rules and stipulations, under which he derives his office; for such rules are not founded on any prohibition of general law, but are only a matter of mere municipal regulation. If, however, the debt arises out of one transaction, in which he acted *both as broker and principal*, it is then void upon principles of common law.³

A debt, arising out of a contract to convey British goods to a market in an *enemy's* country, cannot be proved under a fiat, notwithstanding peace has even been subsequently established between that country and Great Britain;⁴ though, if the contract had taken place *before* the war, it would then revive upon the restoration of peace between the two countries,—the claim of the creditor being, in this case, only suspended by the war.⁵ But, in the case of an *insurance* of foreign property, followed by a war with the country of the assured, a loss incurred by the hostile act of this country cannot (as we have already seen⁶) be recovered upon the return of peace.

Where a servant acknowledged to his master, that he had misapplied sums which he was entrusted to receive from his master's debtors, and therefore gave his master a warrant of attorney for securing the amount by instalments, the master treating his conduct as a mere breach of trust, after which the servant became bankrupt; it was held, that, as the conduct of the bankrupt amounted to the crime of embezzlement,

¹ Ex parte *Daniels*, 14 Ves. 191.

⁵ Ex parte *Bousmaker*, 13 Ves.

² Ex parte *King*, 2 M & A. 676;
³ Dea. 23.

71; post, 308, but see 2 Christ.
B. L. 287.

⁴ Ex parte *Dyster*, 2 Rose, 245.

⁶ Ante, 289.

⁵ Ex parte *Schmaling*, Buck. 93.

which is declared to be a *felony* by the 7 & 8 Geo. 4, c. 29, s. 47, the master could not prove for the amount, until he had prosecuted the bankrupt for the felony.¹

Inadequacy of consideration is also an objection, which may be made to the proof of a debt, as in the case (which has been before put in treating of the proof of annuities.)² But a voluntary bond may be proved, so that payment of it be postponed until all the other debts are satisfied; after which it may be paid out of the surplus.³ And a bond, given for the arrears of a voluntary bond, is deemed a bond for valuable consideration; and may be, therefore, proved without this restriction.⁴

SECTION XXVI.

Of claiming a Debt.

If a creditor cannot ascertain his debt with sufficient certainty, sufficient to enable him to swear to the amount, or where it appears to the commissioner that there is a probable foundation of a demand, though not satisfactorily substantiated, it is usual to suffer a claim of the creditor to be entered on the proceedings.⁵ The benefit of this proceeding is, that when a dividend is declared, he has one also reserved upon his claim; and as soon as his debt is ascertained and proved, he is then entitled to receive the dividend, without being obliged to apply to the lord chancellor for that purpose.⁶

The claiming a debt is often necessary, where there have been extensive dealings between the creditor and the bankrupt as merchants, and no balance has been struck upon the account current between them at the time of the bankruptcy;⁷ or where the eventual balance is uncertain, and depending upon the claim of another party on property in the possession of the creditor;⁸ or where the agent of a creditor, applying to prove on his behalf, cannot at the time produce his authority. So a partner of the bankrupt, though he cannot prove his debt under the fiat, is at liberty to have a claim entered for the amount of his demand.⁹ It is also expressly provided by

¹ Ex parte Elliott, 3 M. & A. 110,

2 Dea. 179.

³ Ante, 257. Ex parte Cator,

1 Bro. 287.

⁴ Gardiner's Assignees v. Shan-

non, 2 Sch. & Lef. 228.

⁵ Gillham v. Lock, 9 Ves. 612.

Stiles v. Attorney General, 1 Atk.

152. Ex parte Berry, 19 Ves. 218.

⁶ 1 C. B. L. 255.

⁷ Cull. B. L. 160.

⁸ Ex parte Simpson, 1 Atk. 70; and see 3 Wils. 271.

⁹ Ex parte Williams, 4 D. & C.

180.

¹⁰ Ex parte Broome, 1 Rose, 69.

the 6 Geo. 4, c. 16, s. 53, that a claim may be entered,¹ in the case of an obligee in any bottomry, or *respondentia*, bond; and also in that of the assured under a policy of insurance, before the loss or contingency shall have happened. So, also, a mortgagee may, in a complicated case, enter a claim for his debt, until the question of right is determined.²

If the claim, however, is not substantiated in a reasonable time, the commissioner may strike it out; and this is generally done before a dividend is declared, unless sufficient reason is offered for its remaining longer on the proceedings; but the creditor is, notwithstanding its erasure, at liberty to prove his debt afterwards, and to receive his share upon any future dividends. And when the creditor has not been guilty of gross laches, he may generally obtain an order for the payment of his proportion of the former dividend out of what money may be in the hands of the assignees, but so as not to break in upon the rights of the rest of the creditors as to such former dividend.

Where a debt was due to an *alien enemy* from the bankrupt, upon a contract *before the war* took place, Lord Erskine ordered a claim to be entered, and the dividend reserved,—holding it contrary to justice to confiscate the dividend in such a case, for that, as the contract was originally good, the right to recover it was only suspended by the war, and would revive upon the restoration of peace.³

A claim to prove a premium on an illegal insurance, or wager, made with a bankrupt, has been held to be a sufficient notice, on the part of the claimant, that his intention is to rescind the contract. Therefore, where after such a claim was made, the commission was superseded, the party was held entitled to recover back the premium, in an action for money had and received against the bankrupt,—on the principle, that a person declaring his dissent from an illegal wager, before the event happens, may recover back the money he has paid.⁴

SECTION XXVII.

Of expunging and reducing a Proof.

Before the 6 Geo. 4, c. 16, the commissioner, after once admitting a proof, could not expunge it without an order of

¹ And see ante, 289.

² *Ex parte Bignold*, 3 M. & A. 706.

³ *Ex parte Boussmaker*, 13 Ves. 71.

⁴ *Bush v. Walsh*, 4 Taunt. 290.

the lord chancellor.¹ But now, by the 60th section of that statute, it is provided, that whenever it shall appear to the assignees, or to two or more creditors, who have each proved debts to the amount of 20*l.* or upwards, that any debt proved is not justly due, either in whole or in part, such assignees or creditors may make representation thereof to the commissioner, who may thereupon summon before him and examine upon oath any person who shall have so proved, together with any other person, whose evidence may appear to him to be material, either in support of, or in opposition to, any such debt. And if the commissioner, upon the evidence given on both sides, or upon the evidence adduced by such assignees or creditors alone, (if the person who shall have so proved shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode,) shall be of opinion that such debt is not due, either wholly or in part, the commissioner is then empowered to expunge the same, either wholly or *in part*,² from the face of the proceedings. The assignees or creditors, however, who require such investigation, must, before it is instituted, sign an undertaking (to be filed with the proceedings) to pay such costs as the commissioner shall adjudge to the creditor who has proved such debt; which may be recovered afterwards upon petition to the court of review.

But this power given to the commissioner, it is declared by the same section, is not to prevent the assignees or creditors from applying, in the first instance, by *petition* to the court above to expunge the debt, nor is either party, in fact, restricted from petitioning against the determination of the commissioner. This power to expunge a proof extends also to the debt of the petitioning creditor. But if the commissioners find that the debt is not of sufficient amount to support a commission, they must state what the actual amount is; that is, they must either expunge it in whole or in part, otherwise they will be ordered to review their report.³ And a petition to the court of review, may be presented by one creditor, although the application to the commissioner must be by two, or more.⁴ A commissioner has no jurisdiction to expunge a proof which has been placed on the proceedings in pursuance of an order of the court of review.⁵

¹ *Ex parte Nizon*, Mont. B. L. App. 34. *Ex parte Graham*, 1 Rose, 456.

² See *ex parte Mann*, Mont. & M. 210.

³ *Ex parte Neal* and *ex parte Sides*, 2 G. & J. 308.

⁴ *Ex parte Broadley*, 2 M. D. & D. 524.

⁵ *Ex parte Whitworth*, 2 M. D. & D. 164.

If the creditor has received a dividend upon the proof, which is ordered to be expunged, or reduced, he will, upon petition, be ordered to refund such dividend, either in all, or in part, as the case may be.¹ But this is not a necessary consequence of an order to expunge a proof.²

With respect to those cases where a proof will be ordered to be expunged, or reduced,—it may be sufficient to observe, that, where the circumstances are such as would prevent a creditor from proving (if he had not proved already), they will equally authorise the expunging, or reduction, of the proof. As, where a creditor proves a debt, excepting certain bills of exchange which he holds as a security, if any of such bills are afterwards duly honoured, or in any way *fully satisfied*, the amount must be deducted from the proof, and the dividends made only upon the residue of the debt.³

Where a creditor took out a commission, and then relinquished it upon obtaining security for his debt, and under a second commission which was afterwards issued, proved the debt, and was also chosen an assignee,—his proof in this case was ordered to be expunged,⁴ and a new choice of assignees directed. And where a creditor had prevailed on the bankrupt to give him a bond for more than was due, and had proved it under the commission,—this proof was likewise ordered to be expunged.⁵

But a proof ought not to be expunged merely because the creditor has instituted process in a foreign country, for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad.⁶ Nor, merely, because the instrument, on which the proof was made, required a stamp.⁷ Nor ought a proof to be expunged, because the creditor falsely deposed that he held no security for his debt; but it should be merely reduced to the balance, after deducting the amount of the security.⁸

If the indorse of a bill of exchange, who proves it under a fiat against the indorser, afterwards receives a composition

¹ Ex parte *Smith*, 1 C. B. L. 124.
Ex parte *Broune*, 15 Ves. 472. Ex
parte *Burn*, 2 Rose, 55. Ex parte
Hunter, 5 Mad. 165.

² Ex parte *Wilson*, 1 M. D. & D.
586.

³ Ibid. Ex parte *Bloxham*, 1 C. B.
L. 167. Ex parte *Wallace*, *ibid.* Ex
parte *Crossley*, *ibid.* Ex parte *Bar-*
ratt, 1 G. & J. 327.

⁴ Ex parte *Paxton*, 15 Ves. 461.

⁵ Ex parte *Brown*, 15 Ves. 472.

⁶ Ex parte *Cotesworth*, 1 D. & C.
281. Ex parte *De Mattos*, 1 M. &
A. 345.

⁷ Ex parte *Byrom*, 3 M. D. & D.
53.

⁸ Ex parte *Relfe*, 2 Dea. 321.

from the acceptor in discharge of the bill, without the consent of the assignees,—as the indorsee by so doing discharges the indorser,—the assignees have also, in such a case, a right to insist that the proof of the debt shall be expunged.¹ This is upon the ground, that a discharge of the principal debtor, without the consent of the surety, discharges the surety.

But the discharge of a *surety* by the creditor has not, as we have seen,² the effect of discharging the principal; nor does it operate as a discharge of the co-surety. Therefore, where a promissory note made by a principal and three sureties was proved by the holder, under different commissions against two of the sureties and the principal,—and the holder afterwards received a composition of 4*s.* in the pound from the third surety,—it was held, under these circumstances, that the proof against the estate of one of the other sureties should not be expunged.³

It has been held that the bankrupt cannot petition to reduce a proof, except by consent;⁴ but it would seem that such a petition can be supported, if he alleges in his petition that there is a probability of a surplus, or of his being entitled to an allowance.⁵

On an unsuccessful application to the commissioner to expunge a proof, the applicants may be ordered to pay the expenses of the meeting.⁶

And where a creditor, whose proof was expunged, succeeded on a petition to have it restored, the court gave him the costs of the petition, as well as of the proceedings before the commissioner, making it an exception to the general rule, that costs are not given against the decision of the commissioner.⁷

And where a proof on a bill of exchange is sought to be expunged, on the ground that it has been paid in full by the drawer, after the proof was made, the petition must be served upon the drawer.⁸

Where the creditor, whose debt is sought to be expunged, is abroad, or lives remote, an order will be made (on motion) that service of the petition on his attorney,⁹ or on the agent to whom the affidavit of debt was sent, shall be deemed good service.¹⁰

¹ *Ex parte Smith*, 3 Brown 1.
¹ C. B. L. 155.

² *Ante*, 310.

³ *Ex parte Gifford*, 6 Ves. 805.

⁴ *Ex parte Pownall*, 2 M. & A. 707.

⁵ *Ex parte Pitchforth*, 3 Dea. 487.
And see *ex parte Coles*, Buck. 256.

⁶ *Ex parte Palon*, 3 Mad. 116.
Ex parte Peyton, Buck. 200.

⁷ *Ex parte Dunlop*, *ibid.* 279.

⁸ *Ex parte Greenwood*, 3 D. & C. 398.

⁹ *Ex parte Kirkeldy*, 1 M. & A. 642. 4 D. & C. 52.

¹⁰ *Ex parte Brooks*, 4 D. & C. 209.

CHAPTER X.

OF THE ASSIGNEES.

1. *Of the Choice of Assignees.*
2. *Of the Interest they take under the Fiat.*
3. *Of the Nature of their Trust; and herein—*
 1. *Of their general Authority, Duty, and Liability.*
 2. *Of their Duty, more especially, in collecting and disposing of the Bankrupt's Property.*
4. *Of Auditing their Accounts.*
5. *When Assignees become Bankrupt.*
6. *Of the Removal of Assignees.*
7. *Of the Official Assignee.*

For actions and suits by and against the assignees, see *post*.

SECTION I.

Of the Choice of Assignees.

Provisional assignee.] By 6 Geo. 4, c. 16, s. 45, the commissioners were empowered, immediately upon declaring the party bankrupt, and before any meeting for the choice of assignees, to appoint a provisional assignee of the bankrupt's estate, who was removeable at the meeting of the creditors for the choice of the regular assignees.

This power was given to the commissioners, for the better securing of the bankrupt's property from the claims of the crown; for an extent at the suit of the crown bound the property of the bankrupt, if *issued before* an actual assignment¹ made by the commissioners. But since the appointment of official assignees under the provisions of the 1 & 2 Will. 4, c. 56, s. 22, and 5 & 6 Vict. c. 122, s. 48, which declare that until assignees are chosen by the creditors, the official assignee is authorised to act as the sole assignee of the bankrupt's estate, the necessity for appointing a provisional assignee no longer continues, and the practice has accordingly become obsolete.

¹ *Queen v. Arnold*, 7 Vin. 104. *Rex v. Cotton*, 2 Ves. 289. *Rex v. Mann*, 2 Str. 749.

Time and mode of choosing assignees.] By the 1 & 2 Will. 4, c. 56, s. 22, the assignees are directed to be chosen¹ at the first of the two public meetings, (of which notice has been previously given in the *Gazette* in the manner stated in a former chapter²) or at some adjournment of such meeting. And all creditors who have proved debts under the fiat to the amount of 10*l.* and upwards, (see 6 Geo. 4, c. 16, s. 61,) are entitled to vote in such choice, as well as *any person duly authorised by letter of attorney*³ from any such creditor; the execution of which must be proved, either by affidavit sworn before a master in Chancery, or by oath before the commissioner *vivâ voce*, and in case the creditor resides out of England, by oath before a magistrate where the party shall be residing, duly attested by a notary public, British minister, or consul. The choice is to be made by the major part *in value* of the creditors so entitled to vote.⁴ But the commissioner has power to reject any person so chosen, who shall appear to him unfit to be such assignee; and, upon such rejection, a new choice of another assignee must be made in his room.⁵ It is no ground, however, for rejecting an assignee, that one of the creditors voting for him has an adverse interest in the estate. And the rejection of the commissioner is not final, and an appeal lies for the revision of the commissioners.⁶

¹ The 5 Ann. c. 22, s. 4, was the first act that introduced the provision respecting the choice of the assignees by the creditors; but no statute before the 6 Geo. 4, c. 16, s. 61, contained any directions when they were to be chosen, though the usual practice was to elect them at the second meeting. For the progress of the law upon this subject, see 1 Christ. 253, 277.

² Ante, 148; and see section 25. The meeting of creditors for the choice of assignees (as well, indeed, as all the other public meetings appointed by the commissioners, where the fiat is executed in London) is now held at the court of Commissioners of Bankruptcy, lately erected in Basinghall-street, in the city of London, originally established under the 1 & 2 G. 4, c. 115.

³ The right to vote under a power of attorney, was by the former law confined to creditors living remote from the place of meeting, and was

not even extended to the case of a creditor prevented by illness from attending. (Ex parte *Garland*, 2 Rose, 351.) One partner, it has been decided, may execute such a power of attorney for himself and his co-partners. Per Lord Eldon, ex parte *Hodgkinson*, 2 Rose, 174.

⁴ It has been doubted, whether a creditor on a voluntary bond is entitled to vote in the choice. Ex parte *Venables*, Mont. 494.

⁵ This power of rejection was before the 6 G. 4, c. 16, vested only in the lord chancellor. (Ex parte *Shaw*, 1 G. & J. 127.) The commissioners, however, had power to adjourn the choice of assignees from the day publicly appointed for that purpose, although all the creditors present concurred in the election. Ex parte *Garland*, 2 Rose, 351.

⁶ Ex parte *Casedy*, Mont. & M. 197.

The appointment of assignees is not complete, till the declaration of appointment is signed by the commissioner; and every creditor who has proved is entitled to vote in the choice, if he apply before the commissioner has signed the appointment, although the commissioner may previously declare the choice to be complete.¹ It is better that the commissioner should not ratify the choice, unless the persons chosen are present, and accept the trust, although their absence will not invalidate the appointment.²

By Rule xx. of the general rules and orders³ for regulating the practice of the court of bankruptcy, the appointment of any assignee under the hand of the commissioner, is to remain of record in the court of bankruptcy, and a certificate of such appointment under the seal of the court, is to be delivered to such assignee by the registrar, upon application for the same.

The choice of assignees is not to be postponed because certain creditors, whose accounts are in an unravell'd state, are not prepared to establish their proofs; for the proceedings under the fiat must not on this ground be impeded; and, in general, the choice of assignees ought to proceed, however few the creditors may be who have made immediate proof.⁴ The commissioner also ought not to adjourn the meeting for the purpose merely of investigating a claim, which is not sufficient to turn the choice; and where this was done upon one occasion, the commissioners were ordered, on petition, to execute the assignment forthwith to the persons who had been elected assignees.⁵ Nor should the commissioner adjourn the choice, to enable a creditor, whose proof has been rejected, to present a petition for liberty to prove and vote in such choice.⁶ The choice, indeed, should never be postponed without a good and sufficient reason, but should be proceeded with to the best of the judgment of the commissioner, unless a petition against it has been previously presented.⁷ And the court of review will not enlarge the time for the choice, upon an *ex parte* application.⁸ If the commissioner, however, is satisfied that a petition for annulling the fiat will be presented, with the consent of all the creditors who have proved

¹ *Ex parte Nash*, 1 D. & C. 445. Mont. 501.

² *Ex parte Ackroyd*, 1 M. D. & D. 555.

³ These orders were made on the 12th January, 1832, in pursuance of the 1 & 2 W. 4, c. 56. See 1 D. & C. append. xxvi. and see post, vol. 2, appendix.

⁴ *Ex parte Butterfill*, 1 Rose, 196.

⁵ *Ex parte Woolley*, 1 G. & J. 366.

⁶ *Ex parte Bignold*, 1 Dea. 743.

⁷ *Ex parte Barclay*, 1 G. & J. 280.

⁸ *Ex parte Laudden*, 1 M. D. & D. 593.

debts, he is, in that case, directed by a general order¹ to adjourn the choice to some future day, in order to give the opportunity for presenting such petition.

The qualifications required to be elected an assignee are merely, the integrity of the party, and his sufficient ability to be responsible for the sums he may receive from the bankrupt's estate.² It is not *necessary* that he should be a *creditor*³ of the bankrupt, though it is usual to elect a creditor to the office. And, although a creditor, who is a party to a deed of assignment of the bankrupt's effects previous to the fiat, is prevented from being petitioning creditor, and setting up that deed as an act of bankruptcy, he is nevertheless eligible as an assignee, under a fiat sued out upon it by another person.⁴

One creditor, if his debt be sufficiently large, may elect *himself* assignee of the bankrupt's estate, within the meaning of the statute, which directs that the choice shall be made by the *major part in value* of the creditors. And the proof of such a creditor is not to be rejected, because he has interests or claims inimical to the general creditors, and *may*, by virtue of such proof, elect himself to be assignee. But if a person of the latter description do elect himself,—as the lord chancellor would, upon an immediate application, remove him,—⁵ the commissioner may now also, under such circumstances, equally reject him. In some cases of this kind, where a length of time had been suffered to elapse before the application for the removal, or where transactions of importance had taken place under the commission, which might have been affected by removing such an assignee,—the lord chancellor appointed another person to be a co-assignee, or as agent, or inspector, solely for the purpose of investigating and contesting the claims of the assignee so self-elected.⁶ In one case, indeed, before Lord Hardwicke, where an assignee died, leaving the bankrupt his sole representative, who thereupon chose himself (the debt being sufficiently large) to be assignee of his own estate,—it was held, that such choice was valid.⁷ But in a more recent case, where the majority of the creditors chose the bankrupt to be assignee, Lord Eldon held, that whether a bankrupt was certificated or not, there was too much inconvenience in it, to permit him to be assignee of his own estate.⁸

¹ 21st August, 1818. Buck. 281.

² Ex parte *Greguier*, 1 Atk. 90. In re *Litchfield*, ibid. 86.

³ 1 Christ. 466.

⁴ *Jackson v. Irving*, 2 Camp. 48.

⁵ Ex parte *Martell*, 1 Rose, 328.

⁶ Ibid. Ex parte *De Tastet*, ibid. 324. 1 Ves. & B. 280; and see ex parte *Basarro*, 1 Rose, 266. Ex parte *Miles*, 2 Rose, 68. 3 V. & B. 139.

⁷ *Cooper's case*, Green, 260.

⁸ Ex parte *Jackson*, 2 Rose, 221.

If a creditor will make oath of a certain sum being due to him, as his account may be afterwards fully investigated, he ought to be permitted to prove to that amount, for the purpose of choosing assignees, unless there appear to the commissioner to be any reasonable objection to the fairness of the debt,—in which case he should only be permitted to claim, till he makes out his demand to the satisfaction of the commissioner.¹ And a creditor holding a security for part of his debt may, if he is desirous of voting in the choice of assignees, petition to have a value put upon the security, and prove for the difference before the security is sold.² But an application of this nature will depend upon its special circumstances, of which the general benefit of the creditors, and the amount of the applicant's debt, are two of the most material.³

A corporation vote in the choice of assignees, by a special power of attorney under their common seal,⁴ and the public officer of a banking company, duly established, may, under the 7 Geo. 4, c. 46, s. 9, also vote by attorney.⁵

A receiver appointed by the court of chancery to prove and receive dividends does not, in consequence of that appointment, possess the power of voting in the choice of assignees;⁶ for the order admitting him to prove is not declaratory of an anterior right, but originates his title; and if the order does not pronounce that he had an antecedent right to prove, he cannot have any right to vote.⁷ So also, it seems that a trustee ought not to be allowed to interfere in the choice of assignees, and that whenever an order of court is necessary to enable a party to prove, he is not entitled to vote in such choice.⁸

The choice of assignees is subject to the most unqualified control of the lord chancellor,⁹ and he will always direct a new choice, when they have been improperly elected. But it is not a sufficient ground to apply for a new choice, merely because creditors were abroad, or were prevented by accident from voting, or have given a defective power of attorney to another person to vote.¹⁰ For if that practice were to prevail, the choice might be postponed to a great length of time, which would be inconsistent with the general provisions of

¹ *Ex parte Simpson*, 1 Atk. 70.

² *Ex parte Nunn*, 1 Rose, 322; and see *ex parte De Tastet*, *ibid.* 324.

³ *Ex parte Smith*, 2 Rose, 63.

⁴ 1 Ves. & B. 518.

⁵ *Ex parte Bank of England*, 1 Swanst. 10. 1 Wils. Ch. Rep. 295.

⁶ *Ex parte Ackroyd*, 1 M. D. & D. 555.

⁷ *Ex parte Shaw*, 1 G. & J. 151.

⁸ *Ibid.* 163.

⁹ *Ex parte Wyatt*, 2 D. & C. 211.

¹⁰ 12 Ves. 12.

¹¹ *Ex parte Shaw*, 1 G. & J. 129.

the bankrupt laws.¹ But if creditors are kept back by fraud, then the court will attend to such an application.² Nor is it a sufficient ground to apply for a new choice, that two or three creditors were excluded by the erroneous judgment of the commissioner, who, if they had been allowed to prove their debts, might have turned the choice; unless, indeed, they were excluded by some improper conduct or fraud practised upon the³ commissioner. But, where the commissioners improperly rejected the proof of a debt to a very large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, a new choice was directed, upon condition that the petitioner indemnified the estate against all the costs.⁴ And where the petitioning creditor was permitted to vote without any further proof of his debt than the deposition at the opening of the commission, the choice was set aside, though confirmed by the due execution of the assignment by the commissioners;⁵ and in one case, though the petition for the new choice was presented some months after the election.⁶ And where, through the error⁷ of the commissioner, or by mere accident,⁸ the great body of the creditors is excluded, without any default on their parts—the court, in this case, will permit them to have the opportunity of voting, and will direct a new choice. But such an application for either of these causes, should be made as soon as possible after the rejection of the proofs; for the court will not interfere, where the applicant has been guilty of delay.⁹

Where, however, the commissioner rejected votes, which would have turned the choice in favour of other persons, on the ground that the creditors tendering these votes had an adverse interest to the general body of the commissioners, the court set aside the choice, without directing a new one, and declared the other persons, who would have been elected by a majority of the creditors, if the votes had not been thus rejected, to have been duly chosen.¹⁰

Where the amount of the creditor's debt, which would have turned the choice, was not disputed, but the proof was opposed by the solicitor to the fiat, on an invalid objection,

¹ *Ex parte Greguier*, 1 Atk. 90.

² *Ex parte Surtees*, 12 Ves. 10.

³ *Ex parte Durent*, Buck. 201.

Ex parte Mathieson, *ibid.* 202. (note.) *Ex parte Hawkins*, Buck.

520. *Ex parte Parr*, 18 Ves. 70.

⁴ *Ex parte Edwards*, Buck. 411.

⁵ *Ex parte Rawson*, 2 G. & J. 353.

⁶ *Ex parte Danby*, Mont. 67.

⁷ *Ex parte Hawkins*, *supra*.

⁸ *Ex parte Dechapeaurouge*, Mont. & M. 174.

⁹ *Ex parte Scholey*, 1 G. & J. 2.

¹⁰ *Ex parte Stallard*, 2 M. D. & D. 469.

which induced the commissioners to reject the proofs, and they refused to adjourn the choice, and the whole proceeding appeared to be a stratagem of the solicitor to hurry on the choice, and prevent the creditor from voting, a new choice was directed.¹

Where, upon a choice of three persons to act jointly as assignees, the court rejects the nomination of *one* of them, it will set aside the choice altogether; as it cannot be collected, from such *joint nomination of the three*, whether it was the intention of the creditors to entrust the administration of the bankrupt's affairs to *two only* of the three,² if one should be rejected. And the same where one of several assignees refuses to serve,³ in which case, if the assignee was chosen without his authority, the costs of a new choice will be ordered to come out of the estate.⁴ But in one case, where one of three assignees refused to act, and the estate would have derived no advantage from the choice of another in his room, the vice-chancellor did not think a new choice to be necessary.⁵

Where the notice of the meeting for the choice of assignees was advertised in the *Gazette* only three days before the meeting took place at Carnarvon, and the creditors at a distance had no opportunity, from the shortness of the notice, of attending the meeting, this was held a sufficient ground for setting aside the choice.⁶ Where, however, creditors, subsequently to the appointment of assignees, signed restrictions authorising the assignees to do certain acts, *as assignees*, which they could not have performed without such authority, it was held that they were debarred from questioning the validity of the appointment at a subsequent period, upon grounds¹ of which they were aware at the time of signature.⁷

In the case of *ex parte Shaw*,² the right of the bankrupt to canvass among the creditors for particular assignees was much discussed; and Sir J. Leach was of opinion, that the choice should, on that ground alone, be set aside. The lord chancellor, upon appeal, did not go into this question, but avoided the election on different grounds; observing, however, that there was great difficulty in determining what degree of interposition on the part of the bankrupt would render the choice null and void; for that, in some cases, the

¹ *Ex parte Spiller*, 2 M. D. & D. 43.

² *Ex parte Shaw*, 1 G. & J. 155.
Ex parte Wilson, 1 M. D. & D. 34.

³ *Ex parte Cattaral*, 1 Dea. 193.

⁴ *Ex parte Kersley*, Buck. 477.

⁵ *Ex parte Morris*, 1 Dea. 498.

⁶ *Ex parte Nash*, 1 D. & C. 445.

⁷ *Ex parte Pearson*, 3 Dea. 324.

advice and solicitation of the bankrupt might not be¹ improper. But where there was a charge that the assignees had fraudulently connived with the bankrupt to get elected to the office, and the court had reason to suspect that the bankrupt in some way interfered in the choice, an inquiry was directed into the truth of the allegation in the petition.²

Joint creditors are, by the 62nd section of the 6 Geo. 4, c. 16, entitled to prove under a *separate* commission, for the purpose of voting in the choice of assignees, and of assenting to, or dissenting from, the certificate.³ But there is no provision enabling *separate* creditors to prove for this purpose under a *joint* commission. The law as to them, therefore, stands as it was before, which prevents them from voting in the choice of assignees under a joint commission.⁴ Upon some occasions, indeed, if the interests of the separate creditors, under a joint fiat,⁵ or if the joint creditors under a separate fiat⁶ require it, an order will be made, that an inspector shall be appointed for the separate or the joint estates, as a check upon the proceedings of the assignees, the costs of which appointment do not, as of course, come out of the estate, on behalf of which the inspector is appointed.⁷

As soon as the assignees are finally appointed, a proper certificate of their appointment, under the hand of the commissioner, must be deposited in the office of the chief registrar of the court of bankruptcy, there to remain of record, a copy of which certificate, under the seal of the court, will be afterwards delivered to the assignees, pursuant to the general order.⁸

SECTION II.

Of the Interest which Assignees take under the Fiat.

The assignees, when duly chosen, stand in the same situation, both with respect to legal and equitable interests, as the bankrupt himself; and are entitled absolutely to all property, of whatever description, which the bankrupt was entitled to

¹ 1 G. & J. 152.

² Ex parte *Molineux*, 1 Dea. 603.

³ Before that statute they were not so entitled, (Ex parte *Simpson*, 2 Rose, 338,) unless there were no separate creditors qualified to vote. Ex parte *Jones*, 18 Ves. 283. Ex parte *Taylor*, *ibid.* 284. Ex parte *Laycock*, 1 Rose, 32.

⁴ Ex parte *Parr*, 18 Ves. 65, 1

Rose, 76. Ex parte *Hamer*, *ibid.*

321. Ex parte *Jepson*, 19 Ves. 224.

⁵ Ex parte *Batson*, 1 G. & J. 269.

⁶ Ex parte *Sanderson*, 3 M. D. & D. 300.

⁷ Ex parte *Burdikin*, 2 M. D. & D. 187. Ex parte *Sanderson*, 3 M. D. & D. 300.

⁸ See ante, p. 334.

for his own benefit, either in possession, reversion, remainder, or expectancy.¹ And under a second fiat, where the bankrupt does not pay 15s. in the pound, the assignees, under Geo. 4, c. 16, s. 127, take, from the date of the appointment, a present vested interest in all future estate acquired by the bankrupt.² But the bankrupt is not actually divested of his property, neither does any property whatever pass to the assignees, before the declaration of appointment is actually signed by the³ commissioner. Nor does any property, the value of which is of a doubtful nature, and in regard to which it is uncertain whether it will be a profit or a burthen to the estate, *absolutely vest* in the assignees, before they have *done some act* to manifest their acceptance⁴ of it. For they are not bound to take all the property of the bankrupt, but only such as, they may consider, will prove beneficial to the creditors, having power to reject all that may be included under, what Lord *Kenyon* termed, a *damnosa hæreditas*.⁵ They have an election, therefore, whether they will take such property or not; but they must make their election promptly; and when they have once elected, they cannot afterwards renounce the property.⁶

But *trust* property of no description passes in any way to the assignees, if it can be distinguished from the general mass of the bankrupt's property. And where, under special circumstances, a bankrupt would be considered as trustee for another, his assignees will be considered in that light also.⁷ For though a court of equity will favour the general creditors of a bankrupt as much as it can, yet it must be only where they have a superior right to other persons.⁸ The assignees are therefore bound by all acts fairly done by the bankrupt, and are also subject to the same equity to which he himself was subject. Thus, where the bankrupt's wife is entitled to trust property, the assignees cannot obtain it in a court of equity, without making a proper provision for the wife.⁹ So,

¹ *Tyrrell v. Hope*, 2 Atk. 562. *Rushworth v. Hobson*, 2 Show. 103. *Pope v. Onslow*, 2 Vern. 286. *Anderson v. Mottley*, 2 Ves. 255. *Ex parte Herbert*, 13 Ves. 188.

² *Ex parte Robinson*, 1 Mont. & M. 44.

³ 2 Co. Rep. 26 a. *Warner v. Barber*, 2 Moore, 71. 8 Taunt. 176. *Ex parte Nash*, 1 D. & C. 445.

⁴ *Copeland v. Stephens*, 1 B. & A. 593; and see post, "Assign-

ment of personal property," and "leases."

⁵ *Bourdillon v. Dalton*, 1 Esp. 233. *Peake*, 238. *Brome v. Robinson*, cit. 7 East, 329.

⁶ Per Lord Ellenborough, 1 B. & A. 307. *Hanson v. Stevenson*.

⁷ *Tyrrel v. Hope*, 2 Atk. 558.

⁸ *Brown v. Jones*, 1 Atk. 190.

⁹ *Parker v. Dykes*, Davies B. L. 281; and see post, "Effect of the assignment on the estate of the wife."

where the bankrupt before his bankruptcy paid a promissory note to a creditor for a valuable consideration, but omitted to indorse it, and the assignees afterwards obtained the amount from the drawer, they were considered as trustees¹ for the holder of the note. In cases of this kind, indeed, the bankrupt himself has been holden not incompetent to indorse the note, after the issuing of the commission;² and the assignees have also, upon petition, been ordered to indorse a bill³ under similar circumstances.

The assignees can also only take such property, as the bankrupt is equitably, as well as legally entitled to.⁴ Therefore, where a trader fraudulently procured good bills in exchange for a bill which he knew to be forged, and his assignees received the amount of the good bills when they became due; it was held, that the person from whom the good bills were so obtained might recover the money from the assignees, in an action for money⁵ had and received. But in the case of the sale of goods, it was held, that though the bankrupt *intended* even to defraud the seller, yet that an actual delivery of them to the bankrupt, before his bankruptcy, vested them in his assignees.⁶ With respect to the specific appropriation, or substitution, of one bill of exchange to answer another when it becomes due,—the assignees have been ordered to apply the proceeds of such substituted bill, to answer the bill dishonoured by the bankrupt.⁷ Where, however, an action was brought against them to recover the proceeds of a bill so specifically appropriated, it was held necessary to prove, that the produce of the bill came into the hands of the assignees, with a *knowledge on their part* of the purposes for which the bill was destined.⁸

The nature of the *interest* taken by the assignees will be more fully explained in the next chapter, and subsequent parts of this work, under the following heads: viz. “Of the effect of the assignment;” “Of actions and suits by and against the assignees;” and “The relation to the act of bankruptcy.”

¹ *Ex parte Byas*, 1 Atk. 124.

² *Smith v. Pickering*, Esp. 30. Peake, 50. *Ex parte Greening*, 13 Ves. 206. *Ex parte Price*, 3 M. D. & D. 586.

³ *Ex parte Moubray*, 1 Jac. & W. 428.

⁴ *Mogg v. Baker*, 3 Mee. & W. 195.

⁵ *Harrison v. Walker*, Peake, 111.

⁶ 4 Esp. 171.

⁷ *Ex parte Peyron*, 2 Rose, 366.

⁸ *Kieran v. Johnson*, 1 Star. 109.

SECTION III.

Of the Nature of their Trust.

1. *Of their general Authority, Duty, and Liability.*
2. *Of their Duty, more especially in collecting and disposing of the Bankrupt's Property.*

1. *Of their general Authority, Duty, and Liability.*

The nature of the trust of the assignees depends, both upon the statute, and upon their general legal character as trustees. Their authority is founded upon the fiat, and their appointment as assignees; and their first duty, both as regards their own responsibility and the interest of the creditors, is to satisfy themselves that the fiat is well founded.¹ For if the fiat be invalid, their appointment also becomes of no effect; and if the fiat be annulled, the assignees are liable to the bankrupt in respect of the property they have disposed of under it. An assignee, indeed, if he chooses to act, is bound to consider the fiat (under which he derives his appointment) as a valid fiat, otherwise he ought to remove himself from the situation of assignee; for the court has no power to indemnify him against the consequences of his acting, nor to prevent any future liability attaching to him in the character of assignee.² And where, in an action directed to be brought against an assignee, for the purpose of trying his right to retain certain goods, it became a question whether the assignee was bound to admit the validity of the commission upon the trial, Lord Eldon said, that if the assignee elected to dispute it, he must do so at the expense of his proof.³ Where also the assignees, after the trial of an action at law, in which they were defeated on the ground of there being no sufficient trading to support the commission, presented a petition to have the commission superseded, and that all the costs and expenses might be paid by the petitioning creditor; it was held that the application came too late, and that the assignees themselves were liable for the costs that had been incurred.⁴

An assignee, who has himself a sufficient debt to support the fiat, ought not to petition to annul, for want of a good

¹ Ex parte Graves, 1 G. & J. 86.

³ Ex parte Jacks, 1 Rose, 393.

² In the matter of Bryant, 2 Rose, 17.

⁴ Ex parte Paul, Mont. & M. 185.

petitioning creditor's debt, without praying for a new fiat;¹ but if his own debt was incurred not anterior to that of the debt of the petitioning creditor, the better course would seem to be to pray that his own debt may be substituted to support the existing fiat. In one case, where an assignee who had acted for more than two months under the fiat, and the proof of whose debt had been rejected by the commissioner, applied to annul the fiat, for want of a good petitioning creditor's debt, contrary to the wishes of the other assignee, and the creditors; the court dismissed his petition, with costs.²

By 6 Geo. 4, c. 16, s. 77, all powers vested in the bankrupt, which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of the creditors, in the same manner as the bankrupt might have executed them.

The authority of the assignees being limited to the purposes of their trust, namely, the distribution of the estate under the fiat, they have no power, therefore, to bind the estate by any contract inconsistent with that object, such as an agreement to dispose of the surplus of the bankrupt's effects, after paying 10s. in the pound to the creditors,³ or to allow the solicitor interest on the amount of his bill of costs.⁴

By 6 G. 4, c. 16, s. 88, the assignees (with the consent of the major part in value of creditors who have proved debts under the fiat, present at any meeting, whereof and of the purport whereof twenty-one days' notice shall have been given in the *Gazette*) may compound with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt, or may submit any dispute concerning the bankrupt's estate to the determination of arbitrators, to be chosen by the assignees and the major part in value of the creditors, and by the party with whom they shall have such dispute. The award of the arbitrators in such a case is declared to be binding upon all the creditors, and the assignees will be indemnified for what they shall do according to such directions. And by 1 & 2 Will. 4, c. 56, s. 43, the agreement of reference may be made a rule of the court of bankruptcy, and therefore all such rights and remedies shall accrue as upon any submission made a rule

¹ Ex parte *Biggs*, 3 M. & A. 393.

² Ex parte *Barft*, 12 Ves. 15.

³ Ex parte *Phillips*, 1 Dea. 366.

⁴ Ex parte *Booker*, 3 Dea. 358.

of any other court of record. By the 88th sect. also of 6 Geo. 4, c. 16, no *suit in equity* can be commenced by the assignees, without such consent of the creditors as above mentioned.¹ But if one-third in value or upwards of such creditors shall not attend the meeting before mentioned, the assignees have power then, with the consent of the commissioner in writing, to do any of the matters specified above.

The assignees, however, may call any other meeting, upon any extraordinary occasion that concerns the creditors; and when they do so, they will act rightly in advertising such meeting, pursuant to the directions of the above section.² But a resolution of the creditors at such meeting does not bind those who are absent.³ Where, at a meeting of creditors, it is resolved that expenses are to be borne by the creditors, in the usual way, each creditor is liable for a part of the expenses in proportion to the amount of his debt; but he is not liable for the share of the others.⁴

In referring disputes to arbitration, the assignees (for their own security) should be careful to protest against the reference being taken, as an admission of assets; for if they refer *generally*, without a protest of this kind, it will amount to such an admission, and will, consequently, render them personally liable to pay the sum awarded, in case of a deficiency of the bankrupt's assets; there being no distinction, in this respect, between assignees, and executors or administrators.⁵

The assignees are not bound by a submission to arbitration made by the bankrupt previous to his bankruptcy. As there is, therefore, no mutuality between them and the other party to the submission, the latter may revoke it.⁶

One assignee cannot, without the consent of the other assignees, advance money to the bankrupt for a particular purpose, although it may be for the benefit of the estate.⁷ Neither can one assignee, by giving the other assignees a *general authority* to act for him, enable them to execute a release *by deed*, for which purpose there must be a special authority under seal; but a release, executed by *one* assignee in the *presence* of the other, binds both.⁸ The *receipt*, how-

¹ And see post, "Of suits at law and equity, by and against the assignees."

² Ex parte Proudfoot, 1 Atk. 251. Ex parte Cater, 1 Bro. 267.

³ Ex parte Phillips, 1 Dea. 368.

⁴ Taylor v. Cohen, 4 Bing. 56.

⁵ Robson v. ———, 2 Rose, 50.

⁶ Marsh v. Wood, 9 B. & C. 659.

⁷ Ex parte Scholefield, 2 M. D. & D. 644.

⁸ Williams v. Waloby, 4 Esp. 220; and see Lord Lovelace's case, W. Jones, 268. Bell v. Dunster-rille.

ever, of *one* only of several assignees, Lord Hardwicke held, was not an absolute discharge to the debtor, making a distinction in this case between *assignees* and *executors*; for, he said, though a payment to one executor is good, because each has a power over the whole estate of the testator, and each is considered as a distinct person, yet, that was not the case with assignees of a bankrupt, who are in the nature of trustees.¹ But it has been decided by Lord Kenyon at *nisi prius*, that a *bonâ fide* payment to one assignee would be good, and that his receipt would bind the estate,² unless, indeed, his co-assignee expressed his dissent; for, without that exception, one assignee might be enabled to dissipate and destroy the estate in despite of his brother trustee.

An assignee ought not to act as solicitor under the fiat,³ nor will an assignee be permitted to charge the estate for business done by himself as accountant, although he carries on that particular business for his own livelihood.⁴ Nor, though it may be sometimes proper for the creditors to make such an allowance, has an assignee any *right* to charge for his travelling expenses⁵ before he become an assignee. But assignees are entitled to such expenses incurred by them since they became assignees.⁶

Assignees under a *separate* commission against one of two partners, cannot in general engage in new adventures with the solvent partner; though they may do so with the consent of the creditors of the bankrupt.⁷ And the court will sometimes direct a reference, to inquire if it is proper for the assignees to carry on the bankrupt's business;⁸ but it will not sanction a removal of a lease by assignees for that purpose, if any creditors object to that arrangement, notwithstanding it may have been determined upon by a majority of creditors present at a meeting duly convened for that purpose.⁹

The assignees have a right to nominate the solicitor to the fiat; but the solicitor may be changed by the majority of the assignees, though any assignee who objects to his

¹ *Cann v. Reed*, 3 Atk. 695.

² *Smith v. Jamison*, 1 Esp. 114.

Bristol v. Eastman, *ibid.* 172.

³ *Ex parte Badcock*, Mont. & M.

231.

⁴ *Ex parte Read*, 1 G. & J. 77.

⁵ *Per Lord Eldon*, *ex parte Bray*,

1 Rose, 145. *Ex parte Elsee*,

Mont. 1.

⁶ *Ex parte Lovegrove*, 3 D. & C.

763.

⁷ *Crawshaw v. Collins*, 15 Ves.

228.

⁸ *Ex parte Mendel*, 4 D. & C.

725. *Ex parte Joyner*, 2 M. & A. 1.

⁹ *Ex parte Miller*, 1 M. D. & D

39.

removal, has a right to know whether that change will be beneficial.¹

When liable for the acts of an agent.] If an assignee employs an agent in the conduct and management of the bankrupt's property, who misapplies and embezzles any part of the effects, the assignee will be liable to make it good, unless he previously consults the body of the creditors (who are his *cestuique trusts*) in the appointment of such agent.² But when the assignees employ a person, either from necessity, or conformably to the general usage of mankind, they are not then liable for losses, or for the default of such agent, if there has been no blameable negligence in their own conduct.³ Thus, where an assignee employed a broker to sell a quantity of tobacco, and the broker received the money, and in ten days failed, without having paid it over, the assignee in this case was held not bound to make it good.⁴ But where the assignees authorise the bankrupt, as their agent, to carry on the business for the benefit of the creditors, and the bankrupt orders goods which are used in the business,—the assignees are liable to an action for the price of them, though they are ordered by the bankrupt in his own name.⁵

Assignees are, like other trustees, only answerable individually for what each actually receives; and the misconduct of one assignee will not operate against his innocent co-assignee.⁶ Thus, where B., one of two assignees, signed the checks for the dividends, and delivered them to S., his co-assignee, who undertook to distribute them to the creditors, and the money was fraudulently received on some of these checks by a clerk of S., and S. became bankrupt before the actual demand of the dividends; it was held, that B. was not liable to the creditors, as the credit of S. was not impeached at the time of the delivery of the checks to him, and that such delivery was in the proper execution of B.'s duty as one of the assignees.⁷ So, where an order of dividend found that a certain balance was in the hands of one

¹ Ex parte *Scruby*, 1 Rose, 207. Ex parte *Tomlinson*, 2 Rose, 66; and see post, "Solicitor."

² In the matter of *Earl of Litchfield*, 1 Atk. 87.

³ Ex parte *Turner*, Mont. & M. 52.

⁴ Ex parte *Belchier*, Ambl. 218;

and see ex parte *Wilkinson*, Buck. 197, and post, 359.

⁵ *Kinder v. Howarth*, 2 Star. 354.

⁶ *Primrose v. Bromley*, 1 Atk. 89. In the Matter of *Earl of Litchfield*, supra.

⁷ Ex parte *Griffin*, 2 G. & J. 114.

of the assignees, and directed that assignee to divide it among the creditors; it was held that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividend.¹

But where, after a dividend was declared, notice was given to the creditors that they might receive the dividend upon application to the assignees; and the acting assignee paid the dividends by checks, which were dishonoured, he having overdrawn the account and absconded; it was held that the other assignees were liable,² although at the choice of assignees it was agreed that one only should act, and notice was given to the bankers to pay the drafts of that one.

So, where one of the assignees, having the sole charge of paying the dividends, paid the dividend of a creditor to a person who was not duly authorised to receive it; it was held that the two other assignees were equally responsible to the creditors for the amount of the dividend.³

Where, however, a memorandum of the commissioners found that a sum of money was in the hands of one of three assignees, and directed it to be invested in the names of all three, which could not be done, as the money was not forthcoming; it was held that the commissioner was not justified in finding, by a subsequent memorandum, that the money was in the hands of all three, and thereupon ordering them to divide it.⁴

The assignees are bound to fulfil a contract made by a bankrupt before his bankruptcy, part of which has already been performed by him. Therefore, where a bankrupt had contracted to purchase a quantity of wool, on an agreement that a deposit of five per cent. was to be made on the amount of the purchase money, and that the remainder was to be paid when he took away the wool; and after the deposit was made, and the bankrupt had taken away part of the wool and paid for it, the price fell in the market; and the assignees contended that the seller could have no further claim after the forfeiture of the deposit; it was held, that (the bankrupt having taken away part of the goods) the assignees were bound in the terms of the contract to take away the remainder, and that the vendor might prove for the difference between the amount of the proceeds of the

¹ *Ex parte Dawson*, 4 D. & C. 130.

² *Ex parte Booth*, Mont. 248.

³ *Ex parte Winnall*, 3 D. & C. 22.

⁴ *Ex parte Leamouth*, 1 D. & C.

491. *Secus*, if the commissioners had originally found it to be in the hands of all three; see *ex parte Ridley*, 3 M. D. & D. 413.

residue of the wool, and the price which the bankrupt had agreed to give for it.¹

Liability for costs.] Assignees are liable to pay the costs of the trial of an issue directed to try the validity of the commission, when the verdict is found against them; and they are also liable for the costs of an issue unsuccessfully contested by them under the Interpleader Act.² But where they have no assets, they are not personally liable to the costs of a suit instituted against the bankrupt, which they continued to defend after the bankruptcy, unless they vexatiously continued the defence.³ And where an assignee had sold by public auction the outstanding debts due to the bankrupt's estate, he was held to be entitled to an indemnity against costs of suits to be instituted by the purchaser in his name.⁴ Assignees will not be made to pay the costs of a petition to annul⁵ the fiat. But an assignee is personally liable for an unqualified promise made by him before the fiat is annulled, as where he promised the landlord that the amount of rent should be paid out of the produce of the sale of the bankrupt's effects, if the landlord would withdraw a distress.⁶ They are also liable to an action for the travelling expenses of a witness, after allowance by the commissioners, though the witness be also a creditor of the bankrupt.⁷

It was held to be no defence to an action by a solicitor against an assignee, for business done as solicitor to the commission, that the commission was sued out under a misrepresentation of the solicitor,—such as that the commission would be operative in the Isle of Man, where it turned out to be wholly fruitless; for the commission, while it existed, would not be considered as a mere nullity; and the only remedy of the assignee, in such a case, was to have recourse to a cross action against the solicitor.⁸ Assignees are also liable to the solicitor whom they retain under the fiat, whether they have funds in their hands or not.⁹ And they may likewise render themselves liable to the solicitor, beyond what he is allowed on the taxation of his bill; although they cannot charge the estate with any fees or costs which have not been so allowed.¹⁰ And though a commission was

¹ Ex parte *Gower*, sittings after Trinity term 1826, cor. Vice-Chancellor.

² *Melville v. Smartt*, 3 Scott, N. C. 357.

³ Ex parte *Gibson*, 1 M. & A. 479.

⁴ Ex parte *Little*, 3 Molloy, 67.

⁵ Ex parte *Edwards*, Buck. 232.

⁶ *Stephens v. Pell*, 4 Tyr. 6. 2. Mylne & K. 334.

⁷ *Yarker v. Botham*, 1 Esp. 64.

⁸ *Pasmore v. Birnie*, 2 Star. 59.

⁹ Ex parte *Coates*, 3 D. & C. 626.

¹⁰ *Finchett v. How*, 2 Camp. 278.

superseded for fraud, to which the assignees were in no way privy, and though they had not, in fact, received any effects under the commission,—they were, nevertheless, held liable to pay the messenger his costs of the several summonses and proceedings *subsequent* to the choice of assignees.¹ Even after a final dividend is made they are still liable to the messenger for his fees and expenses; for they are presumed to know his claim upon them, and ought to reserve sufficient² to satisfy it. But they are not liable to the messenger for his fees, due to him *before* the choice of assignees.³ And after the lapse of ten years, and the death of the assignees, who had employed an auctioneer to sell the bankrupt's property, the court refused to make an order on the new assignees for the payment of his demand.⁴

The assignees are bound to contribute respectively, one to another, for their several proportions of losses, or expenses, occasioned by their joint acts. Thus, where a loss to the bankrupt's estate was brought about by the joint act of three assignees, and an order was made upon the three to make good the loss, and one only paid the whole amount,—upon a bill filed by him against the other two, although it appeared that they had acted under his representation and advice, contribution was nevertheless enforced against them, with costs.⁵ So, where two of three assignees became bankrupt, the solvent assignee, who had paid a debt due from the three to the estate, was held entitled to prove a third of such debt against each of their estates. And, if either of the estates in such a case had proved deficient, it seems, that he would not have been restricted from proving a moiety of the deficiency against the estate of the other assignee.⁶ Two of three assignees, however, cannot bring a *joint* action against the third, for his share of the contribution towards any loss, or payment, but each must bring a separate action.⁷ And, in such an action, the plaintiff is not bound to show, that any funds came into the defendant's hands from the bankrupt's estate.⁸

Where an assignee takes possession, as tenant, of premises which the bankrupt held as lessee for years, his executor is liable to the lessor for a breach of covenant sub-

¹ *Ex parte Hartop*, 9 Ves. 109.
12 Ves. 349.

² *Ibid.* 1 Rose, 449.

³ *Burwood v. Felton*, 3 B. & C.
43.

⁴ *Ex parte Hendrie*, 2 Dea. 76.

⁵ *Lingard v. Bromley*, 1 Ves. &
B. 114.

⁶ *Ex parte Hunter*, Buck. 552.

⁷ *Brand v. Boulcot*, 3 Bos. & P.
235.

⁸ *Hart v. Biggs*, 1 Holt, 245.

sequent to the assignee's death, unless a fresh assignee has been previously appointed.¹

For the duty and liability of the assignees in the payment of dividends, see post, title "Dividend."

2. *Of the Duty and Liability of the Assignees in collecting and disposing of the Bankrupt's Property.*

It is the duty of the assignees to collect in all the bankrupt's property, with as much expedition as the nature of it will admit. They should be careful, however, not to seize the property of other persons, for they will become then personally liable for any loss occasioned by such seizure. Thus, in a case where assignees wrongfully took possession of a farm (which did not belong to the bankrupt) and kept it for a long time, during which they had mismanaged it, the lord chancellor ordered not only the restitution of the property, or its value, but also that the assignees should be personally liable, beyond the funds in their hands, to make good the loss occasioned by such mismanagement; and his decision in this respect was afterwards approved of by the court of King's Bench.²

If assignees under a *separate fiat* are put to any expense in recovering *joint* property, the separate estate is entitled to be reimbursed out of the joint estate.³ But if, under a separate fiat, joint creditors employ a person to collect in the joint property, without first obtaining the sanction of the court, they who employ him must pay the expenses, and not the joint estate.⁴

Sale of the bankrupt's property.] When the assignees have collected in the property, it is their duty to sell it as soon as can be done with advantage; and, if they neglect to dispose of it, the court of review, upon the petition of a creditor, will order a sale, notwithstanding the assignees may be desirous of keeping the estate unsold, conceiving it to be more beneficial for the creditors.⁵ And in one case, where the assignees had permitted the bankrupt to continue in possession of a farm for eighteen months, they were ordered to sell it, and

¹ *Abercrombie v. Hickman*, 8 Ad. & E. 683.

² *Ex parte Cowan*, 3 B. & A. 123.

³ *Ex parte Rutherford*, 1 Rose, 201.

⁴ *Ex parte Longman*, 1 Rose, 303.

⁵ *Ex parte Goring*, 1 Ves. jun.

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to pay the costs of the application.¹ In all these cases, if any individual creditor has called upon the assignees to sell property, which they defer the sale of in the expectation of benefiting the estate, it will be at their peril of answering any difference of price, notwithstanding a considerable number of the creditors approve of the sale being deferred.²

The assignees, being bound to exert themselves to make the most of the bankrupt's property, are accustomed generally to put it up to sale at public auction. But though this is the general practice, they may sell it if they choose by private contract; and (with the consent of the creditors) there would, indeed, be no objection to that mode of sale. If, however, they adopt that method upon their own responsibility, and a complaint be made, that the property by a different mode of disposal might have been made more productive, the court will, upon a proper case made out, direct an inquiry whether the property could have been sold to any, and what, greater advantage.³ Nor will a sale by private contract in any case be sanctioned without a previous reference to the commissioners.⁴ And generally, the court will not make any order *how* the bankrupt's estate shall be sold, but leave that power to the commissioner, who may give directions for selling it in the manner he may think most advantageous.⁵ Neither will an order be made to restrain the assignees from selling in any particular mode; for they act in this respect at their own risk, and upon their own responsibility; and they ought, therefore, to be the best judges of the propriety and expediency of the mode of sale.⁶

An estate of value is frequently sold before the commissioner; and this, perhaps, is the most effectual mode to prevent all collusion between the assignees and any other party. The advertisement for *such* a sale should not be general, but should specify the period of time when the sale is to take place, as in the case of a sale before a master, where the advertisement states that the sale will take place during a certain period, as between the hours of ten and twelve. But, if a better bidder offers after that period is expired, and the commissioner is not gone, he ought to admit him; and if he refuse to do so, the court will, upon petition,

¹ Ex parte Porter, 4 Mont. B. L. App. 31.

² Ibid. Ex parte Hughes, 6 Ves. 617. Ex parte Kendal, 17 Ves. 514.

³ Ex parte Dunman, 2 Rose, 66.

⁴ Ex parte Goding, 1 D. & C. 323.

⁵ Ex parte Comings, 1 Ves. 112.

Ex parte Hurley, 2 D. & C. 63. Ex parte Belcher, 4 D. & C. 1.

⁶ Ex parte Montgomery, 1 G. & J. 338.

open the bidding.¹ For though biddings are not often opened after a sale has actually taken place, yet, under special circumstances, and upon an early application, such an order will be made, if the justice of the case requires it.² Lord Manners, however, refused such an application, where the purchase deed had been executed, and the purchaser put into possession.³

Assignees having the conduct of a sale, under the usual order made on the petition of a vendor having a lien for unpaid purchase money, are justified in taking the opinion of counsel on the conditions of sale, and will be allowed the costs of so doing out of the proceeds of the sale, although those proceeds may fall short of the sum due to the vendor.⁴

Auction duty.] The sales of any real or personal estate of the bankrupt are, by the 6 Geo. 4, c. 16, s. 98, exempted entirely from the auction duty. Where, however, the bankrupt has mortgaged any part of his estate, and the assignees, instead of selling the equity of redemption, take upon themselves to sell the whole property absolutely as the estate of the bankrupt, such a sale has been held by the court of exchequer to be still liable to the auction duty, on the ground that the bankrupt had no interest in the lands higher than an equity of redemption. And the court refused even to deduct the proportional part of the duty, payable on the value of the equity of redemption; considering that one entire duty was payable on the whole, and that if the assignees chose to blend the interest so indiscriminately, the court was not bound to relieve them.⁵

Where, however, the sale is by the order of the commissioner, without consulting the mortgagee, then it has been held that the auction duty is not payable.⁶ And where the assignees sold the bankrupt's houses by auction, and the purchaser signed a contract engaging to complete the purchase on the terms of the conditions of sale, the contract was held to be within the exemption of the 98th section.⁷

Objection as to title.] Assignees are bound, like other persons, to make out a good title to a purchaser, unless they

¹ Ex parte *Green*, 1 Atk. 202.

² Ex parte *Partington*, 1 Ball & B. 209. 1 Rose, 367.

³ Ibid.

⁴ Ex parte *Lewis*, 3 M.D.&D. 173.

⁵ *Rex v. Abbott*, 3 Pri. 178; and see ante, "Proof of creditors

by mortgage;" and see 1 Sugden, V. & P. 17 (10th edition).

⁶ *Attorney General v. Winstanley*, 2 Dow. & Cl. Parl. Ca. 302. 5 Bli. N. S. 130. 2 Y. & J. 124. 3 Y. & J. 126. 1 Cro. & J. 434.

⁷ *Flather v. Stubbs*, 2 Q. B. Rep. 614.

guard themselves by express stipulation;¹ nor can they, without doing so, either compel the completion² of the purchase, or retain the deposit upon the price of the estate, which is contracted to be sold.³ In a case, however, where assignees put up to sale the bankrupt's interest in an estate under such title "as he lately held the same, an abstract of which might be seen at the office of Messrs. J. and Co.,"—it was held, that the vendee could not, after such a notification, insist upon any other title than such as the bankrupt had;⁴ for a vendor, if he thinks fit, may stipulate for the sale of an estate, with such title only as he happens to possess.⁵

And where assignees, on the sale of a piece of land to a purchaser, informed him that no rent had been paid for it by the bankrupt, or by any person under whom he claimed, and the fact was, that rent had been paid by the person who sold the land to the bankrupt, and the person entitled to the rent afterwards recovered possession of the land; it was held, that if the assignees *bonâ fide* believed their representation as to the non-payment of the rent to be true, the purchaser was not entitled to sue the assignees for the recovery of the purchase money.⁶

The assignees are bound to execute any deed that is necessary to carry into effect an arrangement agreed to at a meeting of the creditors for the sale or disposal of the bankrupt's estate.⁷ But where one of several assignees declined to execute a conveyance of part of the bankrupt's property, on the ground that the sale of it was not for the benefit of the estate, the court would not make an order on him to execute the deed, without a previous reference to inquire whether the sale was beneficial to the estate, and whether the conveyance was a fit and proper deed to be executed by the assignee.⁸

By the 6 Geo. 4, c. 16, s. 78, the lord chancellor may, on the petition of the assignees, or of any purchaser of the bankrupt's estate, order the bankrupt to join in any conveyance; and by the 87th section, no title of any purchaser

¹ *M'Donald v. Hanson*, 12 Ves. 277; and see *White v. Foljambe*, 11 Ves. 343. 2 Sugden, V. & P. 152 (10th edition).

² *Orlebar v. Fletcher*, 1 P. Wms. 737.

³ *Bartlett v. Tuchin*, 1 Marsh, 583.

⁴ *Freme v. Wright*, 4 Mad. 394.

⁵ Sir E. Sugden observes upon this case, that conditions like these

should be looked at with great jealousy, as they are often traps for the unwary; and the court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same. 2 Sugd. V. & P. 3 (10th edition).

⁶ *Early v. Garrett*, 9 B. & C. 928.

⁷ *Ex parte Taylor*, 2 Dea. 399.

⁸ *Ex parte Underhill*, 3 Dea. 326.

can be impeached by the bankrupt, or any person claiming under him, unless the bankrupt shall have applied for a *supersedeas* within twelve calendar months from the issuing of the commission.¹

Where title deeds cannot be delivered, assignees must also (like any other vendor) give attested copies of them at the expense of the estate; but they are entitled to limit their covenant, for the production of such deeds, to the time of their continuance as assignees.² In the sale of leasehold property, they are not, as incidental to the contract, entitled to a covenant from the purchaser to indemnify them against the rents and covenants in the original lease; for, to enable them to insist upon such a covenant, there must be an express stipulation to this effect in the agreement for sale.³ And, indeed, there does not seem to be any necessity for a stipulation of this kind at all; for an assignee of a lease, being only liable to the lessor by reason of his privity of estate, is discharged from all further liability as soon as he has effectually assigned the term, and divested himself of all interest in the premises.

The assignees may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate, and even in relinquishing the bankrupt's interest therein, as a *damnosa hereditas*, if they are not able to sell it.⁴

By the 1 & 2 W. 4, c. 56, s. 35, the assignees may, with the approbation of the proper subdivision court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate, in such manner and on such terms as they may think best for the benefit of the persons interested in the estate.

The assignees, also, may be justified in carrying on the bankrupt's trade themselves, where they are authorised to do so by a majority of the creditors, and a dissenting creditor cannot obtain an order that they may cease to do so, without proving that he has sustained some damage from the continuance of the business by the assignees.⁵ But the court will not lend its own sanction to the assignees continuing the trade.⁶

¹ These sections are similar (though somewhat altered) to the provisions in the 3 G. 4, c. 81, s. 4.

² *Ex parte Stuart*, 2 Rose, 215.

³ *Wilkins v. Fry*, 2 Rose, 371.

⁴ *Meriv.* 244.

⁵ *Ex parte Badcock*, Mont. & M. 331.

⁶ *Ex parte Hall*, 2 Dea. 263.

⁷ *Ex parte Hamer*, 2 Dea. 39.

Sanction of court.] The court will not, in general, interfere, on the application of the assignees, to sanction an arrangement made by them for the satisfaction of any claim against the bankrupt's estate;¹ nor for the compromise of a suit by them, nor for carrying on the bankrupt's trade,² although the master reports it would be for the benefit of all parties;³ for in all these matters the assignees must use their own discretion. In some cases, however, where the arrangement proposed to be made by the assignees was decidedly beneficial to the estate, the court has given its sanction to the arrangement;⁴ and in other cases, where there is a fair doubt in the minds of the assignees how to act in a case of difficulty, the court has referred it to the commissioners, to inquire whether the proposed arrangement would be beneficial to the estate;⁵ though such an order is made with reluctance.⁶

Assignees restricted from purchasing bankrupt's property.] The assignees, in the disposal of the bankrupt's property, are considered in their general character as *trustees*; and therefore, upon the general principle that a trustee shall not purchase the estate of his *cestuique trust*, they are held incapable of becoming purchasers themselves of any part of the bankrupt's property, without the consent of *all* the creditors. And upon general grounds of policy alone, and without regard to the fair intentions of the parties, every such sale will be set aside, and the assignees will in general be made to pay the whole expense⁷ incurred by such proceeding. And where an assignee purchases the property, even as trustee for another party, the sale is equally void, and he will be held to be a trustee of it for the benefit of the general creditors.⁸ So, in one case, although the assignee was even a mortgagee of the property, it was ordered to be re-sold, subject to any claim of the assignee by virtue of his mortgage.⁹ If an assignee, after thus purchasing any portion of the bankrupt's property, should have re-sold the estate, and made a profit of it, he will be ordered to account for

¹ Ex parte *James*, 3 D. & C. 290.

² Ex parte *Williams*, 1 M. & A. 689.

³ Ex parte *Hamer*, 2 Dea. 39.

⁴ Ex parte *Prater*, 4 D. & C. 214. Ex parte *Goldney*, 3 Dea. 570.

⁵ Ex parte *Kirby*, 4 D. & C. 400. Re *Hyalop*, 4 D. & C. 809. Ex parte *Marks*, 2 Dea. 862. Re *Marshall*, M. D. & D. 430.

⁶ Ex parte *Bradstock*, 1 Dea. 691.

⁷ *Whicote v. Lawrence*, 3 Ves.

740. *Campbell v. Walker*, 5 Ves.

678. Ex parte *Hughes*, 6 Ves. 617.

Ex parte *Lacey*, *ibid.* 625. *Lister*

v. Lister, *ibid.* 631. Ex parte *Tam-*

ner. Ex parte *Athwood and Owen*

v. Foulkes, *cit.* 6 Ves. 630. Ex parte

Morgan, 12 Ves. 6. Ex parte

Badcock, *Mont. & M.* 231.

⁸ Ex parte *Grylls*, 2 D. & C. 290.

⁹ Ex parte *Turvill*, 3 D. & C. 346.

such profit to the creditors;¹ and the very circumstance of an assignee having made such a purchase, will be a sufficient ground for removing him, as well as his co-assignee who permitted the purchase.² If, however, in investigating a transaction of this description, it should turn out that the contract would be beneficial to the bankrupt's estate,—or where the future sale does not produce more than what the assignee agreed to give for it,³—he will then be held strictly to his bargain. And if he has laid out money in improvements, the estate will be ordered to be re-sold, and put up at the price given by the assignee, adding the sum expended by him; and if there is no bidder beyond that amount, he will then be held to his purchase.⁴ Where an assignee, without the authority of the creditors, bought in the bankrupt's estate, which was put up to auction in two lots, and upon a re-sale there was a loss upon one lot, and a gain upon the other, though the whole balance was in favour of the bankrupt's estate;—the assignee was held in this case chargeable with the whole of the loss on the lot undersold, without being permitted even to set off against it the profit on the other lot.⁵ But where notice was given of a reserved bidding at the sale by the assignee for the benefit of the creditors, and several of the principal creditors present at the sale sanctioned such reserved bidding, and afterwards expressed their approbation of the conduct of the sale; the assignee, under these circumstances, was held not liable for the deficiency between the price that was offered at the sale, and the sum for which the property was afterwards actually sold.⁶

In like manner, if an assignee, instead of selling the estate, should take a lease to himself, he is held answerable to the creditors for profit or loss.⁷ And where an assignee was the landlord of certain premises, which had been let to the bankrupt from year to year, and, without determining the tenancy by any notice to quit, the assignee got possession of the house, and let it to a new yearly tenant, receiving a *bonus* for such new demise,—Lord Eldon decided that he was not entitled to retain it, unless for the benefit of the creditors of the bankrupt.⁸ So, if an assignee purchase dividends of the bankrupt's estate from a creditor, and the purchase be beneficial, he is then considered a trustee for

¹ Ex parte *Reynolds*, 5 Ves. 707.

⁴ Ex parte *Hewitt*, 2 M. & A.

² Ibid. Ex parte *Alexander*, 1 477.

⁵ Ex parte *Lewis*, 1 G. & J. 69.

³ Ibid. Ex parte *Gore*, 3 M. D. & D. 77.

⁶ Ex parte *Buxton*, 1 G. & J. 365.

⁷ Ex parte *Hughes*, 6 Ves. 617.

⁸ Ex parte *Wright*, 2 Rose, 244.

the creditor, or the bankrupt, according to the circumstances of the case.¹ And where an assignee had purchased goods at a sale under the commission, and afterwards became bankrupt, it was ordered, that such of the goods as remained in specie should be delivered up,² and that what he had re-sold should be proved as a debt.

The same disability, as to the purchase of any part of the bankrupt's property, attaches likewise to the commissioners, and the solicitor to the fiat, who, by reason of the situation in which they respectively stand, are subject to the same rule as the assignees are bound by in this respect.³

Under these circumstances, however, the strictness of the rule is sometimes relaxed, upon an application made previous to the purchase, and with the consent of the creditors obtained at a meeting called for that express purpose.⁴ And, if the property is sold by auction, an assignee has there been permitted to bid, on condition that his solicitor should not interfere with the sale;⁵ and in one case an assignee was removed at his own request, in order that he might bid at the sale.⁶ In another case, where (from the situation of the property) it was difficult to obtain a purchaser, and the property had been valued by an indifferent person, and the bankrupt consented to the purchase,—it seems, that an assignee was allowed to purchase.⁷ But though the creditors, at a meeting convened by advertisement,⁸ sanction a sale of the bankrupt's effects at a valuation to an assignee, the court will not order that the assignee shall be allowed to purchase without a reference to the commissioner, to ascer-

¹ Ex parte *Lacy*, 6 Ves. 625.

² Ex parte *Spong*, 1 Rose, 133.

³ *Owen v. Folkes*, 6 Vcs. 639. note (b). Ex parte *James*, 8 Ves. 337. Ex parte *Linwood*. Ex parte *Churchill*, cited *ibid.* 343. Ex parte *Bennet*, 10 Ves. 381.

⁴ Ex parte *Hodgson*, 1 G. & J. 12. Ex parte *Page*, 4 Mad. 459. Ex parte *Molineux*, 4 D. & C. 460.

⁵ Ex parte *Morland*, Mont. & M. 76. *Anon.* 2 Russ. 350.

⁶ Ex parte *Perkes*, 3 M. D. & D. 385.

⁷ Ex parte *Maychell*, Whitm. B.L. 153. Sed quare, whether there must not have been also the consent of the creditors, as well as that of the bankrupt.

⁸ There may be some doubt how

far the consent of such a meeting would be sufficiently indicative of the consent of the creditors, (and see *Nias v. Adamson*, 3 B. & A. 225,) as few persons, in point of fact, see the *Gazette*, and a meeting of creditors is, in point of practice, but very thinly attended. The power of creditors present at such a meeting to bind those who are absent, has been often indeed somewhat hastily presumed; and the 6 Geo. 4, c. 16, gives it only in some peculiar cases, such as to enable the assignees to compound with creditors, submit to arbitration, commence suits in equity, or accept a composition contract from the bankrupt or his friends.

tain whether the property can be more advantageously disposed of.¹ And such an order has been refused, where the meeting was only attended by half in value of the creditors.² And where an assignee thinks proper to purchase the bankrupt's property, without a previous application to the court, the purchase will not be confirmed, because it has been consented to at a meeting of creditors.³ Nor will any order be made to allow an assignee to purchase any portion of the bankrupt's property, unless the other assignees, as well as the bankrupt, are served with the petition.⁴

By the 6 Geo. 4, c. 16, s. 102, the major part in value of the creditors present at the choice of assignees, might direct how and where the money received out of the bankrupt's estate should be paid in, and remain until it was divided. But now, by 1 & 2 Will. 4, c. 56, all securities and monies are required to be paid by the official assignee into the Bank of England; and by the general order no official assignee⁵ can keep under his own control more than 100*l.* belonging to any one bankrupt's estate; and as soon as the monies received by him amount to 100*l.*, they must, until deposited in the Bank of England, be paid into the hands of a banker. And by 6 Geo. 4, c. 16, s. 102, no money can be paid into the hands of any of the commissioners, or of the solicitor to the commission, or into any banking house or other house of trade, in which any such commissioner, assignee,⁶ or solicitor⁷ is interested.

¹ *Ex parte Serie*, 1 G. & J. 187.

² *Ex parte Beaumont*, 3 D. & C. 549.

³ *Ex parte Thwaites*, 1 M. & A. 323.

⁴ *Ex parte Page*, 4 Mad. 459.

⁵ Nov. 12, 1842.

⁶ For want of this restriction, much inconvenience and loss was formerly occasioned to the creditors. See *ex parte Baker*, 18 Ves. 246.

⁷ This enactment, with the exception of the prohibition contained in the last part of it, is conformable to the 5 Geo. 2, c. 30, s. 32, which contained a similar provision. But, notwithstanding the directions of this last mentioned act, it frequently happened that large sums of money remained in the hands of the assignees, who delayed dividing the same amongst the creditors, and often made use of the money for

their own purposes. To remedy this evil in some measure, Lord Loughborough, by a general order, 8th March, 1794, directed that, where the creditors had not given directions where the money was to be placed, the assignees should pay it into the Bank of England, as often as it amounted to 100*l.* Money, however, to a large amount was still often retained by the assignees, which occasioned frequently considerable losses to the creditors; and the only means, which the court had, to deter assignees from such misconduct, was to make them pay interest for all money wilfully retained in their hands. *Ex parte Lane*, 1 Atk. 90. *Turner v. Townsend*, 1 C. B. L. 274. 1 Cox, 50. 1 Bro. 384. *Hilliard's case*, 1 Ves. 89. *Hankey v. Garratt*, 3 Bro. 460. *Ex parte Edwards*,

By the 6 Geo. 4, c. 16, s. 103, the commissioner may direct any money to be invested in the purchase of exchequer bills, for the benefit of the creditors, and may cause the same to be sold, when it shall seem to him expedient that the proceeds should be again laid out in the purchase of others for the benefit of the creditors; subject, however, in all cases, to the control of the court of review.

Penalty on assignee retaining money in his hands.] And by 6 G. 4, c. 16, s. 104, if any assignee shall retain¹ in his hands, or employ for his own benefit, or knowingly permit his co-assignee to retain or employ, any sum to the amount of 100*l.* of the bankrupt's effects; or shall neglect to invest money in the purchase of exchequer bills, when directed as above-mentioned; he will be liable to be charged by the commissioner with interest, at the rate of 20 *per cent.*,² on all such money for the time during which he shall have retained or employed it, or permitted the same to be done, or during which he shall have neglected to invest the money in the purchase of exchequer bills.

This enactment will be construed strictly against the assignees, as the act is imperative; and great mischief indeed would frequently ensue to the creditors, if assignees were encouraged, by any laxity of construction, to disregard regulations so important to the general interests of the creditors. Therefore, where an assignee kept 346*l.* in his hands for about three months,—though without any evil intention being imputed to him, and having in fact acted meritoriously in the general matters of his trust,—he was, nevertheless, ordered by Lord Eldon to pay the penalty of 20*l.* *per cent.*, from the time when he ought to have paid the money into the bankers.³ But where assignees gave checks upon the banker of the estate to an *agent*, to enable him to purchase exchequer bills, pursuant to the commissioners' order, for the benefit of the estate—and the agent received the money and converted it to his own use, but

6 Ves. 3. *Ex parte Townsend*, 15 Ves. 470. *Ex parte Baker*, 18 Ves. 246. This induced the legislature, first in the 49 Geo. 3, c. 121, s. 4, and now in this act (*section 104*), to impose a severer pecuniary penalty upon the assignees for not obeying the directions of the creditors or commissioners, as to the deposit and investment of the money belonging to the bankrupt's estate.

¹ The former enactment in the 49 G. 3, c. 121, s. 4, was if he should *willfully* retain, &c.

² There is some doubt whether this charge is to be 20*l.* *per cent.* *per annum*, during the whole period of retention, or only one single charge of 20*l.* *per cent.* upon the gross sum retained. *Ex parte Lowe*, 1 D. & C. 137.

³ *Ex parte Bray*, 1 Rose, 144.

some time afterwards replaced it at the banker's,—it was held, that the assignees were not, for the acts of an agent so employed, chargeable with the 20 per cent. upon the amount of the monies misapplied; as this was not a *wilful* retention or employment of the money for their own benefit.¹ The penalty of 20 per cent. is to go in augmentation of the general estate of the bankrupt, and does not belong to any particular creditors, as a compensation for the loss they have suffered from the acts of the assignee.² Nor has the bankrupt himself any legal or equitable claim to the penalty, either in respect of his allowance, or his right to the surplus.³ The commissioner cannot charge both assignees with 20 per cent. where only one had the money, unless he finds that the other knowingly permitted it.⁴ Where an assignee died after the misapplication of monies in his hands, Sir J. Leach thought that his estate was liable to pay the 20 per cent. upon the funds misapplied, though the amount of this *penalty* could not be considered (as the amount of the misapplied funds was) a specialty debt against the deceased assignee's estate;⁵ but Lord Eldon decided in this case, that the estate could only be charged with 5 per cent.⁶ The penalty is meant to apply to a solvent assignee only, and is not intended to prejudice the general creditors of a *bankrupt assignee*, against whom a different penalty is imposed by the 105th section of the statute. Therefore, where the assignee becomes bankrupt, his co-assignee will be permitted to prove for the amount of the money so misemployed, with interest at 5 per cent., and not to include in the proof the penalty of 20 per cent.⁷ In order to charge the assignees in an *action* with the 20 per cent. on balances retained, it seems that the commissioner ought previously to settle an account charging them with such interest; and, as it is in the nature of a penalty, it must be declared on *specialty*, and is not recoverable on the common count for interest.⁸

¹ Ex parte *Wilkinson*, Buck. 197. Quere, whether, though the word *wilful* is omitted in the 6 Geo. 4, c. 16, s. 104, the assignee would, under these circumstances, be more liable to the penalty than he was before.

² *Wackerbarth v. Powell*, Buck. 495.

³ Ex parte *Lowe*, 1 Deac. & C. 137. Mont. 392.

⁴ Ex parte *Benham*, 2 M. & A. 272. 1 Dea. 26.

⁵ *Wackerbarth v. Powell*, Buck. 495.

⁶ *Id.* 2 G. & J. 151.

⁷ Ex parte *Goldsmith*, 1 G. & J. 405.

⁸ *Beresford v. Birch*, 1 Carrington. N. P. 378.

SECTION IV.

Of auditing the Accounts of the Assignees.

There are various provisions in the 6 Geo. 4, c. 16, as to the keeping and the auditing of the accounts of the assignees. Thus, by *section* 101, they are directed to keep an account of all property of the bankrupt received by them, and all payments made by them on account of the bankrupt's estate; which account every creditor, who has proved a debt under the fiat, may inspect at all seasonable times. And by a general order¹ of Lord Loughborough the assignees under a joint fiat are required to keep distinct accounts of the joint and separate estates. By *section* 106, the commissioners were directed, at the meeting for the bankrupt's last examination, to appoint a public meeting, not sooner than four calendar months from the issuing of the commission, nor later than six calendar months from the bankrupt's last examination, whereof twenty-one days' notice must be given in the *Gazette*, to audit the accounts of the assignees, who are required to deliver upon oath a true statement in writing of all money received by them respectively, and when and on what account, and how the same has been employed. The accounts, however, may now (by the 5 & 6 Vict. c. 122, s. 27,) be audited either at or after the meeting for the bankrupt's last examination. The commissioner is required by the first-mentioned statute to examine the statement of the assignees, and compare the receipts with the payments, and ascertain what balances have been from time to time in their hands, and inquire whether any sum ought to be retained by them. In this inquiry the commissioner may examine the assignees upon oath, who are to be allowed to retain all such money as they shall have expended in suing out and prosecuting the fiat, and other just allowances. The allowance thus made by the commissioners, Sir J. Leach thought ought not to be reviewed, except in matter of principle.² But this decision was overruled by Lord Eldon, who held that the court had jurisdiction to review the *quantum* of the allowance.³ And extra costs, incurred by the assignees, in conducting prosecutions for perjury and conspiracy, with the sanction of the creditors, were directed to be allowed, as coming fairly

¹ 8th March, 1794.² *Ibid.* 277.³ *Ex parte Anthony*, 2 G. & J.

under the description of "just allowances."¹ The audit account of the assignees must, by the general order,² be made out in the ordinary form of a debtor and creditor account, each item being entered according to its date, and a name, date, and proper explanation given to such item. A duplicate of the account must be sent by the official assignee to the solicitor two days at least previous to the day appointed for the audit. But the commissioner may, if he thinks proper, require another account digested, under proper heads, to be annexed to the audit account.

At every audit also, (by the general order³) the debtor and property book exhibited to the court by the official assignee, must be carefully examined and compared with the debts and profits collected, as stated in the audit paper; and the cause of any monies remaining uncollected must be ascertained, and a minute thereof made and filed with the proceedings. All persons appearing to be indebted to the bankrupt's estate are to be forthwith summoned and examined in that behalf upon oath; and the examination so taken must be filed with the proceedings, and such directions are to be given by the court as to any further proceedings thereupon as to the court shall seem fit. No audit and dividend are to be appointed for the same day except for some special cause, to be stated to the court in writing at the time of such appointment and allowed.⁴ And by Lord Lyndhurst's general order⁵ for regulating the conduct of official assignees, every such assignee is required, before any audit, to enter in the debtor and property book the names of all the debtors to the bankrupt's estate, as returned in his balance-sheet, and to state the reasons why debts are not paid on the opposite page, such book to be produced to the court at every audit.

Although the period of six calendar months (specified in the 106th section of 6 Geo. 4, c. 16,) from the last examination of the bankrupt, may have elapsed without the accounts of the assignees being audited, the commissioner has nevertheless authority to appoint a meeting for that purpose.⁶ And although an audit meeting has closed, and the assignees' accounts are then settled, the commissioner, at any future

¹ Ex parte *Strange*, 1 Mont. & M. 31.

² 12th Nov. 1842, rule 16. See post. Appendix, and 3 M. D. & D. Append. lvii.

³ 12th Nov. 1842, rule 17, post,

Appendix, and 3 M. D. & D. Append. lviii.

⁴ Id. rule 18.

⁵ 12th Nov. 1842, rule 18, post, Appendix, and 3 M. D. & D. Append. p. lxx.

⁶ Ex parte *Holyland*, 1 Dea, 367.

meeting, has power to examine the assignees as to monies received before and not included in such accounts, and to re-investigate those accounts generally, if need be,¹ but not, where certain items have been allowed, for the purpose of disallowing those items.²

The commissioner also has no power under the 106th section to *charge* the assignees with monies "which, but for their wilful default, they might have received;" but he has authority to inquire into the matter, and make a report on the subject to the court of review.³ The assignees are not entitled to be allowed in their accounts the expense of a meeting of creditors to consider what they should have determined on themselves, nor the tavern expenses of the bidders at a sale of the bankrupt's property.⁴ But where law charges were incurred by the petitioning creditor previous to the commission, and the assignees afterwards derived a benefit from the proceedings in which they were incurred, it was held that they might be allowed the assignees, under "just allowances."⁵

An assignee, who makes an affidavit to dispense with his personal attendance at the audit, must pay the costs of the affidavit.⁶ Where one of these assignees went abroad, and was not to be heard of, and the two others had all the assets in their hands, the court ordered the audit to pass on the oath of the two.⁷

The assignees, also, may (by 6 Geo. 4, c. 16, s. 101), be summoned by the commissioner at any time to produce all books and documents relating to the bankruptcy, and in case of their making default in obeying the summons, their attendance may be enforced by warrant; and upon the refusal of any assignee to produce them, the commissioner may commit him to prison, until he shall submit himself to the commissioner.

Besides the above provisions as to the authority of the commissioner over the assignees, the latter can be compelled also to account for what they have received, by *petition*,⁸ but not by *bill*,⁹ of the bankrupt or of any of the creditors. But a previous application should be made for this purpose to the commissioner, and if he miscarries in his judgment, or refuses to act, the bankrupt or the creditor may then petition the

¹ Re *Applegarth*, 2 D. & C. 101.

² Ex parte *Bonham*, 1 Dea. 26.

³ Ex parte *Keys*, 2 D. & C. 633.

⁴ Ex parte *Molmeux*, 2 Dea. 33.

⁵ Ex parte *Hadfield*, 2 Dea. 115.

⁶ *Ibid.*

⁷ Ex parte *Heatherley*, 2 Dea. 93.

⁸ Per Lord Eldon, Buck. 92. Ex parte *Grimwood*, 1 Dea. 394.

⁹ *Santon v. Davis*, 18 Ves. 80.

court to have the accounts taken.¹ And when an assignee is charged by the bankrupt with misconduct in selling a portion of the bankrupt's property, and with want of diligence in recovering certain debts, the court of review will refer it to the commissioner to inquire into the circumstances, and report thereon to the court.² Where a bankrupt petitioned for an inquiry against his assignees under a commission which had been issued seventeen years before, and there had been no transactions relating to the present estate for fifteen years, the inquiry was refused as to the personal estate; but it being sworn that one of the assignees had been in the receipt of the rents and profits of the real estate up to the period of his death, which happened only a few months before presenting the petition, an inquiry was directed as to the real estate against the surviving assignee.³ And where a creditor, after the accounts had been passed by the commissioners, petitioned for a reference to the master, with liberty to surcharge and falsify, and the court was satisfied that there was ground for allowing further inquiry to that extent, it did not require that a specific error should be established.⁴ But after there has been a change of assignees, and a long period of time has elapsed, the court will not refer the account of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees.⁵ It has been determined, also, that a creditor must apply in the first instance to the commissioners, before he can present a petition for an order to inspect the accounts, and that he is not entitled to have copies of them, unless he offers to pay for them.⁶ But, under the 132nd section of the 6 Geo. 4, c. 16, it has been held that the bankrupt may petition for copies of the accounts, without a previous application to the commissioner, and that the assignees are bound to furnish such copies, and not merely allow him to inspect the accounts.⁷

Where at the audit meeting the commissioner finds a certain sum to be in the hands of the assignees and declares a dividend accordingly, it seems that each of the assignees is liable for the payment of the dividend, although the principal fund for that purpose was in the hands of only one of the

¹ Ex parte *Brocksopp*, Buck. 304.

⁵ Ex parte *Richards*, 4 D. & C. 183.

² Ex parte *Byrom*, 3 M. D. & D.

⁶ Ex parte *Granger*, Mont. & M.

55.

284. Ex parte *Aberdeen*, 2 D. & C.

³ Ex parte *Newhouse*, 1 M. D. & D. 508.

34.

⁷ Ex parte *Emerson*, 2 Dea. 156.

⁴ Ex parte *Townsend*, 2 Molloy, 42.

assignees. If one assignee objects to be so charged with money in the hands of his co-assignee, he should state his objection to the commissioner at the audit, and not lie by until a petition is presented for the payment of that dividend.¹

SECTION V.

When Assignees become Bankrupt.

The bankruptcy of an assignee does not put an end to the trust; and the money which he has received, remaining unaccounted for by him, may be proved under his fiat. The proper person to prove is the solvent co-assignee; and the amount of the proof will be the balance due from the bankrupt assignee, with interest at 5 per cent.² But, if a proof in the original bankruptcy be not made until after the bankruptcy of the assignee, the demand of the creditor (so proving under the original bankruptcy) cannot be proved under the fiat against the assignee, and consequently will not be barred³ by the assignee's certificate.

When an assignee becomes bankrupt, *his* estate will not be entitled to any dividend on the proof made by him under the estate of which he was assignee, until full reimbursement is made to that estate of the money which he had in his hands at the time of his own bankruptcy;⁴ for a man ought not to come as a *creditor* upon an estate, of which he is himself a *debtor*.⁵

Where two of three assignees became bankrupt, the solvent assignee, who had paid a debt due from the three to the estate, was held entitled to prove a third of such debt against each of their estates. And if, in such case, either of the estates had proved deficient, it seems that he would not have been restricted from proving a moiety of the deficiency against the estate of the other assignee.⁶

By 6 Geo. 4, c. 16, s. 105, if any assignee shall retain in his hands, or employ for his own benefit, any sum to the amount of 100*l.* of the bankrupt's estate, and become bankrupt himself, being so indebted to the estate of which he is assignee, his certificate will only have the effect of freeing

¹ *Ex parte Ridley*, 3 M. D. & D. 413.

² *Wackerbarth v. Powell*, Buck. 495. *Ex parte Goldsmith*, *supra*.

³ *Ex parte Stonehouse*, Buck. 531.

⁴ *Ex parte Bignold*, 2 Mad. 470.

⁵ *Ex parte Bebb*, 19 Ves. 222.

Ex parte Graham, 3 V. & B. 138.

² *Rose*, 74.

⁶ *Ex parte Hunter*, Buck. 552.

his person from arrest and imprisonment; but his *future effects* (with certain exceptions) will remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his fiat, together with interest for the whole debt.

The penalty of 20 per cent. imposed by the 104th section, it has been already¹ observed, does not apply to the case of a bankrupt assignee; for that would operate as a prejudice to his own general creditors, without imposing scarcely any penalty on himself for his default. The 105th section, therefore, provides a severer penalty, by rendering his future effects liable to the extent of his default, notwithstanding his certificate.

Where B. sent out a power of attorney to an agent in America to recover what money he could from his debtor, who had absconded there, and afterwards sued out a fiat against him, and was chosen one of his assignees, and the agent in America, after the issuing of the fiat, obtained a sum of money from the debtor, and remitted it to B. in England, who subsequently himself became bankrupt; it was held that this money was received by B. in his character of assignee, and that he might, under the 6 Geo. 4, c. 16, s. 105, be charged with the amount, together with interest at 5l. per cent., notwithstanding he had obtained his certificate.²

By a general order³ of Lord Loughborough, if an assignee become bankrupt, he is to be removed, and ceases to be an assignee.⁴ And in that event, as well as in case of his death, upon application made to the commissioner, and signed by one or more creditors, who have proved under the fiat and are entitled to vote in the choice of assignees, the commissioner should cause notice to be given in the *Gazette* of the time and place to proceed to the choice of a new assignee, instead of the one become bankrupt, or dead. And, as this general order supersedes the necessity of a petition for removal, such a petition, if presented, will be dismissed with costs.⁵

¹ See ante, 360.

⁴ And see *ex parte Newton*,

² *Ex parte Ralph*, 3 M. D. & D. 1 Atk. 96.

⁵ *Ex parte Watts*, 1 Rose, 436.

331.

³ 8th March, 1794.

Ex parte Bonsor, 1 M. D. & D. 194.

SECTION VI.

Of the Removal of Assignees.

By the 6 Geo. 4, c. 16, s. 66, the lord chancellor was empowered, upon petition, to order any conveyance¹ or assignment of the bankrupt's estate to the assignees to be vacated, but no title of any purchaser prior to such order was to be thereby affected, and no estate previously barred to be thereby revived.² And the commissioners, also, might be ordered to execute a new assignment of the debts and effects unreceived and not disposed of, to any other person or persons to be chosen by the creditors, whereby the debts and personal estate of the bankrupt were declared to be thereby vested in such new assignees. The commissioners were likewise directed, upon such removal and appointment, to cause advertisements giving notice thereof to be inserted in the two next *London Gazettes*; and any new conveyance was declared to be valid, without any conveyance from the former assignees, provided the order for vacating any bargain and sale was enrolled, and any new bargain and sale was also enrolled in the same court as the first.

By the 1 & 2 Will. 4, c. 56, s. 36, the court of review has also power to remove any assignee; which order of removal is final and conclusive, and not subject to any review of the lord chancellor. And where an assignee is thus removed, and another is appointed in his room, there is now, under the provisions of the 1 & 2 Will. 4, c. 56, s. 25, no necessity for any assignment to the new assignee, but all the estate vested in the removed assignee is declared to vest in the new assignee by virtue of his appointment.³

The power possessed by the lord chancellor, of removing assignees, will always be exercised in a case of gross misconduct,⁴ or fraud; and in all such cases an assignee will be ordered to pay the costs of the petition for his removal, and of a new choice.⁵ Thus, if an assignee makes use of, or

¹ This was an extension of the 5 Geo. 2, c. 30, s. 31, under which statute there was sometimes a difficulty in vacating the bargain and sale to the assignees of the freehold property of the bankrupt; as that statute only spoke of vacating the assignment. See *ex parte Corry*, Buck. 316. In *re Goodchild*, Buck. 322, note. *Ex parte Bainbridge*,

6 Ves. 451. *Ex parte Leman*, 13 Ves. 271.

² And see in *re Goodchild*, Buck. 322. *Ex parte Harris*, 3 Mad. 473.

³ *Ex parte Faber*, 1 D. & C. 32.

⁴ *Ex parte Halkiday*, 7 Vin. Ab. 77. 12 Ves. 13.

⁵ *Ex parte Perryer*, 1 M. D. & D. 276.

trades with, the bankrupt's property for his own benefit,¹ connives at the insertion of a fictitious debt in the bankrupt's balance sheet,² or purchases an estate belonging to the bankrupt,³ he will in each of these cases be removed; and in the last case, a co-assignee, who permitted such purchase, was also ordered to be removed. So, where an assignee refuses to act,⁴ or is proved to be insolvent, or to have compounded with his creditors; or where an account cannot be conveniently and justly taken while he remains assignee, he will also, in either of these cases, be removed;⁵ and the same, where he sells his debt to a creditor, who is adverse to the fiat.⁶ In one case, where an assignee was in insolvent circumstances, and there was no blame attached to him, an order was made that he should be restrained from acting as assignee, and that another person should be appointed to act in his name, giving him a proper indemnity.⁷ And where the sole assignee was the managing clerk of a solicitor who had bought an estate of the bankrupt, and had neglected to complete the purchase, the court ordered him to be removed, and that there should be a new choice.⁸ But the mere circumstance, that an assignee has an unsettled account with the bankrupt, or that his debt may be disputed by the creditors, is not a sufficient cause for his removal; unless, indeed, there is something in the nature of his interest, rendering it impossible to take the account with due impartiality and justice.⁹ An assignee, who becomes bankrupt, we have already seen, is removable under the general order,¹⁰ which supersedes the necessity of a petition for that purpose. And an assignee permanently residing in *Scotland*, or having quitted this country, will be removed upon petition; for the court has no hold over him, and can reach him by no process,¹¹—and in such a case, service of the petition at his last place of abode will be deemed good service.¹² And an assignee has been removed, to enable him to bid.¹³ But it was held not a valid ground for the removal of assignees, that the commissioners improperly rejected the

¹ Ex parte *Townsend*, 15 Ves. 470.

² Ex parte *Perryer*, 1 M. D. & D. 276.

³ Ex parte *Reynolds*, 5 Ves. 707.

⁴ Ex parte *Kersley*, Buck. 477.

⁵ Ex parte *Surtees*, 12 Ves. 10; and see ex parte *De Tastet*, 1 Rose, 324.

⁶ Ex parte *Stagg*, 2 M. D. & D. 186.

⁷ Ex parte *Copeland*, 3 D. & C. 561.

⁸ Ex parte *Ashmore*, 3 M. D. & D. 461.

⁹ *Ibid.*

¹⁰ *Ante*, 366.

¹¹ Ex parte *Grey*, 13 Ves. 274.

¹² Ex parte *Bonbonus*, 3 Mad. 23. Ex parte *Corry*, Buck. 314.

¹³ Ex parte *Perkes*, 3 M. D. & D. 385.

proof of a debt, that would have turned the choice, unless the rejection had been fraudulent.¹

Where trustees under a trust deed issued a fiat against the debtor, to prevent creditors dissenting from the trust deed from issuing an adverse fiat, and the trustees did not further prosecute the fiat than by getting themselves appointed assignees; the court, on a petition of the adverse creditors, ordered the trustees to be removed from the office of assignees, in order to take the accounts against them as trustees.²

The bankrupt has, for good cause assigned by him, a right to petition for the removal of assignees,³ although his estate may not be expected to produce a surplus.⁴ It has been stated that he cannot support such a petition, without the concurrence of, at least, one creditor;⁵ but where he shows that there will be a surplus of his effects, this does not seem to be necessary.⁶ If, however, it appears that the bankrupt's petition for the removal of an assignee is got up in collusion with the other, and merely out of a spirit of hostile opposition to the assignee against whom it is presented, the petition will be dismissed.⁷

A creditor, though he has not proved, may petition for the removal of an assignee; but if he do not, in support of his petition, make an affidavit of his debt, his petition will be dismissed with costs.⁸ Where a creditor petitions for the removal of an assignee, without alleging sufficient grounds for that purpose in his petition, but merely states them on affidavit, his petition will be dismissed with costs.⁹

Where one of three assignees declines to act, and a petition is presented for a new choice, the two acting assignees should join in the petition, or, if one only presents it, it should be served upon the other acting assignee.¹⁰

Where an assignee petitioned for the removal of his co-assignee, on the ground of misconduct, which was denied by the latter, who recriminated, a special reference was directed

¹ Ex parte *Dürent*, Buck. 201.
Ex parte *Milner*, 3 D. & C. 235.

² Ex parte *Mendel*, 4 D. & C. 725.

³ Ex parte *Hedges*, 1 G. & J. 158, note. Ex parte *Langford*, *ibid.* Ex parte *Jackson*, 1 G. & J. id. 144, note. G. Cooper, 286.

⁴ Ex parte *Oakes*, 2 M. D. & D. 60.

⁵ Ex parte *Townsend*, Eden, B. L. 2d ed. 222.

⁶ Ex parte *Archer*, 2 G. & J. 110.

⁷ Ex parte *Oakes*, 2 M. D. & D. 60.

⁸ Ex parte *Barnett*, 2 M. D. & D. 692.

⁹ Ex parte *Paramore*, 1 Dea. 279.

¹⁰ Ex parte *Harris*, 2 D. & C. 4.

to the commissioner to inquire into and report the circumstances of the case.¹

Where one of three assignees was rejected, Lord Eldon ordered a new choice altogether, to give the creditors an opportunity of choosing three again, if they thought proper.² And the same course was pursued, where one of several assignees refused to act.³ And where one of several assignees is removed for any cause, it seems that the 1 & 2 Will. 4, c. 59, ss. 25, 26, requires, for the effectual vesting of the bankrupt's estate, that a new assignee should be appointed in his room.⁴

But in one case, where one of three assignees refused to act, and the estate was small, and would have derived no advantage from appointing another in his room, Sir J. Leach dispensed with a new choice.⁵

In all cases where an assignee is removed, an action for money had and received may be maintained against him by the remaining assignee.⁶ But it has been held that a mere order of the lord chancellor for removing one of several assignees, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment by the commissioners, did not operate to divest the legal estate out of such removed assignee; and therefore, in a case of this kind, where the remaining assignees (three in number) brought an action of trover, though there was no plea in abatement by the defendant to the whole action, they were held entitled to recover only three-fourths of the property for which the action was brought.⁷

If, however, the order for removal is followed up by the appointment of a new assignee, we have seen that all the estate is vested in the new assignee by virtue of his appointment. And where the assignment was vacated, and a new assignee regularly appointed in the room of the former ones, it was held that he might sue in his own name, without noticing the fact of their removal, or his own appointment, in the declaration,—and this though the cause of action accrued in the time of the former assignees.⁸

If an assignee applies to be removed upon his own peti-

¹ *Ex parte Oulton*, 3 M. D. & D. 336.

² *Ex parte Shaw*, 1 G. & J. 155.

³ *Ex parte Steel*, 1 D. & C. 488.

⁴ *Ex parte Rolls*, 1 Dea. 618. *Ex parte Daniell*, 3 M. D. & D. 612. But see *ex parte Perkes*, 3 M. D. & D. 385.

⁵ *Ex parte Kersley*, Buck. 477.

⁶ *Smith v. Jameson*, Peake, 213.

⁷ 1 Esp. 114.

⁸ *Blaxam v. Hubbard*, 5 East, 407.

⁹ *Alldrith v. Kettridge*, 8 Moore, 372.

tion, it seems that he should make an affidavit, that he does not apply under an apprehension that any application will be made against him by another person for that purpose.¹ And where an assignee, who has been guilty of misconduct, applies to be discharged on payment of costs, the court will direct that the order shall be without prejudice to any future application against him.² Whenever an assignee wishes to retire, he will be required to pay the costs of a meeting for a new choice, and of his application to retire,³ as well as to give security⁴ to indemnify the estate against any costs of legal proceedings already commenced, and not continued by the new assignee, unless such costs were properly incurred. He must, also, permit the new assignee to use his name in any legal proceedings already commenced, upon being indemnified by the new assignee.⁵ Where there is only one assignee surviving, and he is desirous of being removed on the ground of infirmity, the proper course is to procure a new choice in the room of those who are dead, and then to apply that he may be removed.⁶ Where an assignee is removed for the convenience of the estate, as in case of infirmity, he does not pay the costs occasioned by his removal, as he does when removed⁷ for his own convenience, and he is entitled to be reimbursed out of any fund, before it is transferred to the new assignee.⁸ Nor is he liable to the petitioning creditor for his bill of costs as taxed by the commissioner, unless there is a charge of collusion between him and the new assignee.⁹

A new assignee, who continues by suggestion on the record a suit commenced by his predecessor, may, under the 6 Geo. 4, c. 16, s. 67, recover a penalty, as well as his predecessor.¹⁰

¹ *Ex parte Edwards*, 6 Ves. 3.

In re Roberts, *ibid.* 465. 3 Mad.

² *Ex parte Angle*, 4 D. & C. 118.

273.

⁶ *Ex parte Rapp*, 1 D. & C. 461.

³ *Ex parte Watts*, 1 D. & C. 322.

⁷ *Anon.* 5 Mad. 76. *Ex parte Perkes*, 3 M. D. & M. 385.

⁴ The commissioners have no authority, it seems, to take such security.

⁸ *Ex parte James*, 1 D. & C. 272.

⁶ *Ex parte Thorley*, Buck. 231.

⁹ *In re Gibson*, 1 G. & J. 303.

¹⁰ *Bates v. Sturges*, 7 Bing. 585.

SECTION VII.

Of the Official Assignee.

By the 1 & 2 Will. 4, c. 56, s. 22, the lord chancellor was authorised to appoint a number of persons, not exceeding thirty, being merchants, brokers, or accountants, or persons who were or had been engaged in trade in London or Westminster, to act as official assignees, one of whom is directed to be an assignee of each bankrupt's estate, together with the assignees chosen by the creditors. And by the 5 & 6 Vict. c. 122, s. 48, the lord chancellor has the same power to appoint an equal number of official assignees in all bankruptcies prosecuted in this country, who (by ss. 49, 50, 51,) are given the same powers and subject to the same duties as those imposed by 1 & 2 Will. 4, c. 56, which directs that they shall give such security, and be subject to such rules, and act in such manner as the judges of the court of review, with the consent of the lord chancellor, shall from time to time direct. All the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the real and personal estate of the bankrupt, are to be received by the official assignee alone, except where it is otherwise ordered by the court of bankruptcy, or any judge or commissioner thereof. All stock, monies, exchequer bills, and other public securities, and all bills, notes, and other negotiable instruments, must be transferred and delivered by each official assignee into the Bank of England, to the credit of the accountant in bankruptcy (by 5 & 6 Will. 4, c. 29, s. 4), to be subject to such order as the lord chancellor, or the court of review, or any judge of the court of bankruptcy, if authorised by any general order of such court, shall direct. And if any such assignee shall neglect to make such transfer, delivery, or payment, he is liable to be charged in the same manner as is provided by the 6 Geo. 4, c. 16, s. 104, in cases of neglect by assignees to invest money in the purchase of exchequer bills.¹ The above provision as to the transfer of all securities into the Bank of England was on one occasion dispensed with, on the petition of all the assignees, as to certain securities which could not conveniently be made available, unless they remained in the hands of the official assignee.² Until assignees are chosen

¹ See ante, p. 359.² Ex parte *Barnewall*, 1 M. D. & D. 537.

by the creditors, the official assignee is authorised to act as the sole assignee of the bankrupt's estate; but he has no power to interfere in the appointment or removal of the solicitor, or in directing the time and manner of effecting any sale of the bankrupt's estate.¹

By s. 24, in case of any vacancy occurring in the number of official assignees, the lord chancellor may appoint some other person; and in case of any death or removal, the court of bankruptcy may appoint one of the other official assignees to act in the bankruptcy in his stead.

By the rules and orders in bankruptcy made by the court of review, and approved by the lord chancellor, in pursuance of the provisions of the 1 & 2 Will. 4, c. 56, the official assignees in London were directed to be divided equally among the six London commissioners,² each commissioner having power to appoint his class of assignees to act in rotation under the several bankruptcies prosecuted before him; such rotation to be settled by ballot. No official assignee can, either directly or indirectly, carry on any trade or business, or hold any other office or employment. Every one must find sureties to the extent of 6,000*l.*, and with them execute a joint and several bond to the two registrars in that amount; and in case of the death or insolvency of either of the sureties, each official assignee must, on pain of dismissal, give immediate notice in writing to the chief registrar. The above regulations, by a general order of Lord Lyndhurst of the 12th Nov. 1842, apply also to official assignees in country bankruptcies; and by rule 5 of such order, every official assignee must on the 1st of January in every year, or within one week afterwards, file a declaration in writing with the chief registrar of the court of bankruptcy that his sureties are alive and solvent, and state any change of residence of either of them. When any person is appointed an official assignee in London, it is directed by a general order³ (21st of July, 1835), that, upon filing his appointment and lodging his securities with the chief registrar, he shall be forthwith attached to the list of one of the commissioners having the smallest number of official assignees on their lists; and where the number upon several lists shall be equally small, he is to be allotted by the chief registrar

¹ See 1 & 2 W. 4, c. 56, s. 23.

² See general rules and orders of the 12th January, 1832, for regulating the practice of the court of

bankruptcy, xvii. et seq. 1 Dea. & C. App. xxvi.; and see post, vol. 2, Appendix.

³ 1 Deac. 692.

to one of them by ballot, except where it is otherwise specially ordered by the court of review. Each official assignee is required to follow the instructions of the commissioner under whom he acts, subject to such directions as shall from time to time be prescribed by the court of review.

Remuneration.] By the 5 & 6 Vict. c. 122, s. 51, the official assignees, whether appointed for town or country bankruptcies, are to be paid out of the bankrupt's estate such sum as to the court named in and acting under the fiat may seem just and reasonable, having regard to the amount of the bankrupt's property, and the nature of the duties to be performed by the assignee, subject to such orders as may from time to time be made by the lord chancellor.

By the general rules and orders of the 12th January, 1832, before referred to, the commissioners were recommended to allow the official assignees 1 per cent. on the monies they respectively receive, and $1\frac{1}{2}$ per cent. more on the monies actually divided, subject, nevertheless, to be increased or diminished in any case under special circumstances, to be referred to the court of review.

Before the passing of the 5 & 6 Vict. c. 122, s. 5, which appears to take away all control of the court of review over the remuneration of the official assignees, and to transfer the jurisdiction in this respect to the lord chancellor, it was determined, that although the court of review would entertain a petition against the allowance made to an official assignee by the commissioner, it would not review the decision of the commissioner as to the *quantum* of the allowance, unless he had proceeded on any erroneous principle;¹ and that an official assignee was not entitled to any *commission* on the amount of the proceeds of the sale of the bankrupt's mortgaged property, which are paid over by the purchaser to the mortgagee, and which are not sufficient to satisfy the debt due on the mortgage.²

Liability.] No official assignee (by 5 & 6 Vict. c. 122, s. 54,) is to be deemed personally responsible or liable for any act done by him, or by his order or authority, in the execution of his duty, by reason of the petitioning creditor's debt, trading, or act of bankruptcy, being insufficient to support the affidavit.

¹ Ex parte *Tiplady*, 3 D. & C. 570.

² Ex parte *Whison*, 3 Den. 646.

As to the duty of the official assignee, with respect to the *auditing* of his accounts, and the payment of dividends, see ante, "Audit," and post, "Dividend."

By the general order¹ of Lord Lyndhurst, made (Nov. 12, 1842,) in pursuance of the 5 & 6 Vict. c. 122, there are various other duties required of the official assignee. He must enter in a book, called "The register estate book," the names of the bankrupts in the commissions and fiats to which he is appointed;² and keep various other books, particularly specified, relating to the property of the bankrupt. He must next sort and number the bankrupt's books, papers, and writings, and file a list of them with the proceedings, and deliver to the bankrupt a written notice or letter in the form³ specified in the schedule to the order, requiring him to make out a list of his debts, credits, &c. He must direct every debt owing to the bankrupt which exceeds 500*l.*,⁴ and all monies in the hands of the creditor's assignees, to be paid into the Bank of England to the credit of the accountant in bankruptcy. He is prohibited from keeping under his control upon any one estate more than 100*l.*, or in the aggregate of monies of bankrupts' estates more than 1,000*l.*⁵

When he pays any money into the Bank of England, he must state in writing, delivered therewith to the cashier of the bank, in the form specified in the schedule to the general order, the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt, and that it is to be placed to the credit of the accountant in bankruptcy. He must also take a receipt from the cashier of the bank, and on the same day transmit it to the office of the accountant in bankruptcy, who is to give a proper voucher for such receipt, such voucher to be produced when called for by the court.⁶ All monies, not paid into the Bank of England, must, as soon as they amount to 100*l.*,⁷ be paid by him into the hands of a banker, with whom he is to keep an account as official assignee. Before any audit, he must enter in the book, called the debtor and profits book, the monies of all the debtors to the bankrupt's estate, as returned in his balance sheet, and state the reasons why debts are not paid on the opposite page; such book to

¹ See 3 Mont. Deac. & D. Appendix, lxvi.

² Rules vi., vii., and viii. See post, vol. 2, Appendix.

³ See 3 Mont. Deac. & D. Appendix, lxxvii.

⁴ Rule ix.

⁵ Rule xiii.

⁶ General order of Lord Lyndhurst, 12th Nov. 1842, Rule xiv.

⁷ Rule xv.

be produced to the court at every audit.¹ He must deposit in the Bank of England, to the credit of the accountant in bankruptcy, all bills, notes, and other negotiable instruments,² except unaccepted bills of exchequer, as soon as he shall receive the same, and all unaccepted bills as soon as they are accepted, or dishonoured, and must at the same time leave with the cashier of the bank a proper statement in writing of the particulars of all the instruments so deposited. When any bill or note shall be dishonoured, the official assignee must forthwith give such notice thereof as is by law required from the holder of such bill. He must once in every quarter³ of a year deliver to the court to which he shall be attached, an account made up to the last day of the preceding month, together with his cash book and banker's pass-book, duly balanced, and any other books that the commissioners may require; and such account must show the balances placed to the credit of the accountant in bankruptcy, and of every estate under the charge of the official assignee, in the books kept in the office of the accountant in bankruptcy; and such account must also show the balances of every bankrupt's estate then under the control of the official assignee.

And by rule 33 of the above general order, if the official assignee shall keep under his control more than 100*l.* of money belonging to any one estate, or more than 1,000*l.* in the aggregate of monies belonging to bankrupt's estates, for more than one week, he is to be charged in his account by the commissioners with such sum as shall be equal to interest at the rate of 20*l.* per cent. on the excess, for such time as such money shall be under his control beyond that period. And, unless the money has been kept from proper causes, he is to be dismissed from his office, upon the report of the commissioner, or upon petition to the lord chancellor by the creditor's assignees, or by any creditor, and will be liable to the costs and expenses, and have no claim to remuneration.

By 5 & 6 Vict. c. 122, s. 92, every official assignee is required, on or before the 1st of March in every year, if parliament be then sitting, and if not, then within fourteen days from the commencement of the then next session of parliament, to lay before parliament a return showing the total amount of his receipts and payments during the year preceding, and up to the 31st of December in that year, upon

¹ *Id.* Rule xviii.

² Rule xix.

³ Rule xxix.

every estate under his charge, and also the balances appearing by his books to be then in the Bank of England standing to the credit of the accountant in bankruptcy, and of every such estate, and also the balances of every such estate then in the hands or under the power or control of such official assignee, and also the several sums allowed to him for remuneration, and for petty expenses, under every estate, which return must be certified by the court to which such official assignee shall be attached; and is also to be subject to such further regulations as the lord chancellor may think fit to make. The official assignee, being merely a ministerial officer, it seems, cannot resist the payment of a dividend.¹

Where an official assignee has no funds in hand, he cannot be compelled to join in a suit in equity with the other assignees, without being indemnified as to the costs; and upon the same principle, where the creditors' assignees had contracted to sell all the bankrupt's effects, and the official assignee was not a party to the contract, the court would not compel him to execute a deed containing a covenant to sue for the recovery of the debts, without a previous reference to the registrar, to settle the form of the deed, and what indemnity he was entitled to.² If, however, an official assignee improperly refuse to join in any suit, he may be made a defendant, and then incur the risk of having to pay his own costs.³

Where an official assignee applied to be indemnified by the creditor's assignee from the costs of a pending action, in which his name had been joined as a co-plaintiff, without his consent, the court of review offered him a reference to the commissioner to inquire whether the action was for the benefit of the estate, but this being declined by him, ordered the petition to stand over till the result of the action was known, and it appearing afterwards that a verdict was obtained against the assignees, and that the creditors' assignee had offered his personal indemnity long before the petition was presented, the court, upon the renewal of that undertaking, dismissed the petition with costs.⁴

And where a bankrupt had been guilty of a breach of trust, and the official assignee was made, with the other assignees, a party to a suit by the *cestuique trusts*, it was held that he was not entitled to his costs out of the fund, although the bankrupt's estate was exhausted; for the bank-

¹ Ex parte *Alexander*, Mont. 503.

² 1 Deac. & C. 513.

³ Ex parte *Young*, 2 Dea. 240.

⁴ Ex parte *Evans*, 3 D. & C. 470.

⁵ Ex parte *Turquand*, 3 M. D. & D. 475.

rupt, if solvent, would have had all the costs to pay, and the assignees might have made a reservation out of the bankrupt's assets to meet the costs.¹

Where an official assignee is made a defendant to a foreclosure suit, as representing the interest of a mesne incumbrancer, he is not entitled to his costs though he disclaim absolutely.² And if he be included in an order for payment of costs, the order may be enforced against him alone.³

An official assignee ought not, except under very peculiar circumstances, to present a petition to the court in his own name;⁴ and the court will not sanction an application by him to reduce a proof, unless it is made by desire of the creditors, or by the direction of the commissioner. If he appears separately on the hearing⁵ of a petition, without any necessity for so doing, he will be ordered to pay his own costs.⁶

But an official assignee may file a bill against the personal representatives of a deceased assignee, for an account of unclaimed dividends possessed by the deceased assignee.⁷

An action for money had and received lies against an official assignee to recover money received by him while acting under a void fiat, and not paid into the Bank of England, as directed by the 1 & 2 Will. 4, c. 56, s. 22.⁸ And where an official assignee made default in not accounting for monies received, the court permitted the creditors' assignees to use the names of the chief registrars, in suing the sureties upon the bond.⁹ The official assignee is not within the protection of the 6 Geo. 4, c. 16, s. 44, and therefore is not entitled to notice of action by the bankrupt for seizing his goods under the fiat.¹⁰ And he is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney.¹¹

Where an official assignee resigns his office, he should apply to the court of review for an order that he may be formally discharged and released from his duties under the

¹ *Williams v. Nixon*, 2 Beav. 472.

² *Clarke v. Wilmot*, 1 Phillips, 276, reversing S. C. 1 Young & C. Chan. Ca. 53. *Cash v. Belcher*, 1 Hare 310.

³ *Ex parte Murray*, 1 M. & A. 475.

⁴ *Anon.* 1 Dea. 106.

⁵ *Ex parte Groves*, 2 Dea. 265.

⁶ *Ex parte Hendrie*, 2 Dea. 76.

⁷ *Green v. Weston*, 3 M. & A. 414. 3 Myl. & Cr. 385.

⁸ *Munk v. Clarke*, 3 Moore & S. 463.

⁹ *Ex parte Topham*, 1 Dea. 192.

¹⁰ *Knight v. Turquand*, 2 Mees. & W. 101.

¹¹ *Sidney v. Belcher*, 2 Mood. & R. 324.

several fiats, as specified in a certificate of the commissioner to whose court he may be attached; which order the court will make, upon his undertaking to pass his accounts from time to time, as the several estates in the different bankruptcies shall be respectively wound up.¹ An official assignee, however, is not entitled, upon his resignation or removal, to retain the papers belonging to the bankrupt's estate in his hands until he is remunerated for his services under the fiat; and if he refuses to hand them over to his successor, he will be ordered to deliver them up, with costs.²

And where an official assignee, after his removal, neglected to pay over a sum of money which he had received under the fiat, he was ordered to pay it forthwith, together with interest at the rate of 20*l.* per cent. for the time of his retention of the money.³

By the 5 & 6 Vict. c. 122, s. 53, the court acting in the prosecution of any fiat issued before the commencement of that act, may appoint one of the official assignees to act with the existing assignees under such fiat, and direct the latter to pay and deliver over to such official assignee all monies, books, papers, and effects whatsoever in their possession or custody, as such assignees, save where it shall be otherwise directed by the lord chancellor. The appointment of an official assignee under this section is a matter peculiarly within the discretion of the commissioner, with which the lord chancellor will not interfere, unless under very strong circumstances, and such interference was refused, although an estate had been nearly wound up, and all that remained to be got in consisted of the damages recovered in an action by the creditors' assignees, who had expended large sums out of pocket in the prosecution of the action.⁴

¹ *Ex parte Goldsmid*, 3 Dea. 309.

³ *Ex parte Turner*, 2 M. D. & D.

² *Ex parte Graham*, 2 M. D. 481.
& D. 290.

⁴ *Ex parte Boucher*, 3 M. D. & D.
324.

CHAPTER XI.

OF THE BANKRUPT'S PROPERTY THAT PASSES TO THE ASSIGNEES.

PART I.

- SECT. 1. *Of Freehold Property generally, and the Mode of Conveyance.*
2. *Of Copyholds.*
 3. *Of Mortgages.*
 4. *Of Offices.*
 5. *Of Advowsons.*
 6. *Of Reversions and Remainders.*
 7. *Of Powers.*
 8. *Of a Possibility.*
 9. *Of a voluntary Conveyance.*
 10. *Of an executory or beneficial Contract.*
 11. *Of the Estate of the Wife, and Property settled on the Wife and Children.*

Having considered generally in the preceding chapter the nature of the interest taken by the assignees of the bankrupt, it is proposed in the present one to specify more particularly the effect and operation of the bankruptcy, as it regards the various species of the bankrupt's property, dividing the subject into two parts : viz.,

1. As it affects the Bankrupt's Real Estate.
2. As it affects the Personal Estate.

The *real estate* may be treated of more conveniently under the foregoing heads.

SECTION I.

Of Freehold Property generally, and the Mode of Conveyance.

By the 6 Geo. 4, c. 16, s. 64,¹ the commissioners were directed, by deed indented and enrolled in any court of record, to convey to the assignees, for the benefit of the creditors, all the bankrupt's real estate in England, Scotland,² or elsewhere in the British dominions. But it was held, that under this section, the commissioners had no power to convey estates of which the bankrupt was seised as a bare trustee.³ And where lands had been bargained and sold by a bankrupt *before his bankruptcy*, although the enrolment of the bargain and sale did not take place until after the bankruptcy, it was held that these lands did not pass to the assignees.⁴

The necessity of an assignment from the commissioners to the assignees, which was formerly required for the effectual transfer to them of the bankrupt's property, is now dispensed with by the 1 & 2 Will. 4, c. 56; for by the 26th section of that statute, all the present and future real estate of the bankrupt, whether in the United Kingdom, or in any of the dominions, plantations, or colonies, is declared to vest in the assignees by virtue of their appointment, without any deed of conveyance⁵ for that purpose. And, when any assignee shall die, or be lawfully removed or displaced, and a new assignee appointed, such of the real estate as shall remain unsold or unconveyed is declared, by virtue of such appointment, to vest in the new assignee, either alone, or jointly with the existing assignees, without any conveyance for that purpose. And by section 27, where any conveyance or assignment of a real or personal property of a bankrupt is

¹ This section, (except as to the provision respecting copyhold and colonial property) was taken from the 13 Eliz. c. 7, s. 11; and 5 G. 2, c. 30, s. 26.

² Previously to this act, a commission of bankruptcy in England was held by the Court of Session, not in itself to operate upon the heritable property of the bankrupt in Scotland, though it was considered to impose upon him a legal obligation to execute the proper

conveyances, and do the necessary acts for transferring such property to his assignees. *Bank of Scotland v. Cuthbert*, 1 Rose, 462; and see *Sellrig v. Davies*, 2 Dow. P. C. 230.

³ *Ex parte Gennys*, Mont. & M. 358.

⁴ *Audley v. Walsey*, Sir W. Jones, 203.

⁵ But see post, p. 383, as to estates tail.

required by law to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the British dominions, plantations, or colonies, a certificate of the appointment of the assignees, purporting to be under the seal of the court of bankruptcy, shall be registered instead; which is declared to have the like effect as the registry of the conveyance would have had. But the title of the purchaser of any such property, for valuable consideration, without notice of the bankruptcy, who shall have duly registered his purchase deed previous to the registry of the appointment of assignees, shall not be invalidated by reason of such appointment, or the vesting of such property consequent thereupon, unless the certificate of such appointment shall be registered, as regards the United Kingdom, within two months from the date of such appointment, and, as regards all other places, within twelve months.

The certificate of appointment need not be registered, under the provisions of this section, unless the property is situate in a register county.¹

Any *contingent interest* which the bankrupt may have in any lands or tenements, and which is *vested* in him at the time of his bankruptcy, will pass to his assignees. Therefore, where an estate was settled to the bankrupt for life, with other intervening uses, remainder to himself in fee, with power to change the uses,—the remainder in fee was held to vest in the assignees, and his power of revocation to be gone.²

A *right of action* is within the policy of the bankrupt laws;³ and therefore a right to bring a real action also passes to the assignees.⁴

A bankrupt's lands are not liable to a debt by statute or judgment, unless execution is taken out upon it before the date of issuing of the fiat, and not even then, if the statute or judgment creditor had notice of any act of bankruptcy at the time of levying such execution; for, in that case, he can only come in *pro rata* with the rest of the creditors.⁵ But if a statute be extended upon the bankrupt's lands before the period mentioned in the act, though the liberate is not sued out till afterwards,—in that case, the lands are bound by the statute.⁶ And where lands descend to a bankrupt as

¹ Anon. 1 D. & C. 349.

² Loft, 71; and see post, 363.

³ *Ferguson v. Spencer*, 1 Man.

& G. 987.

⁴ *Smith v. Coffin*, 2 V. & B. 444.

⁵ 2 & 3 Vict. c. 29, *Newland v.*

Watts, 1 P. Wms. 92. *Orlebar v.*

Duke of Kent, *ibid.* 737.

⁶ 1 C. B. L. 373.

heir, and the ancestor was indebted at the time of his death, it has been determined that a specialty creditor has the same right to follow the real assets, or their specific produce, in the hands of the assignees, as if the heir had not become bankrupt.¹

Joint-tenancy.] If a bankrupt is entitled to lands in joint-tenancy, and dies,—it is said² by Billingham that there is no right of survivorship, and that his share may be sold by his assignees; for that the bankrupt's moiety is bound by his bankruptcy, as he had power to sell it in his life-time, and might have departed with it.³ It seems doubtful, however, if the bankrupt had died before the execution of the bargain and sale, whether such moiety would in that case have passed to the assignees; as the real estate was, not till then, taken out of the bankrupt at law.⁴ And if the bankrupt had died before adjudication, the commission being in that case absolutely void,⁵ the whole estate would, of course, have gone to the surviving joint-tenant. As a valid commission of bankruptcy, however, followed up by adjudication and assignment, always operated as a dissolution of partnership, it seems to be agreed, that it also severs a joint-tenancy.⁶

Estate tail.] With respect to the conveyance of any *estate tail* of a bankrupt, some very special enactments on the subject are contained in the 3 & 4 Will. 4, c. 76, the act for the abolition of fines and recoveries, which (by section 55) repeals altogether the 65th section of the 6 Geo. 4, c. 16, and (by section 56) directs the commissioners acting in the execution of any fiat, to dispose of, by deed, any estate tail of the bankrupt to a purchaser for valuable consideration, for the benefit of the creditors, and empowered him to create as large an estate in the lands disposed of as the bankrupt could have done. By section 57, the commissioner is in like manner directed to dispose of, by deed, of any base fee in lands of any tenure, to which the bankrupt was entitled as tenant in tail, provided at the time of the disposition there be no *protector* of the settlement by which the estate tail converted into the base fee was created; and by such dis-

¹ *Ex parte Morton*, 5 Ves. 449.

² *Billingham*, 111.

³ C. B. L. 279. Good, 89.

² *Com. Dig.* 26.

⁴ *Doe v. Mitchell*, 2 M. & S. 446.

⁵ *Ex parte Beale*, 2 Ves. & B. 29.

¹ *Rose*, 140.

⁶ *Evans on the Bankrupt Statutes*, 17 note (b).

position the base fee shall be enlarged into as large an estate as the same could have been enlarged by the bankrupt. By section 58, certain provisions are made where there is a protector of the settlement by which the estate tail was created, for enabling the commissioner to stand in the place of the actual tenant in tail, so far as regards the consent of such protector.

By section 59, every deed by which any commissioner shall, under the act, dispose of lands, not held by copy of court roll, is declared to be void, unless enrolled in chancery within six calendar months after its execution; and every such deed disposing of copyhold lands must be entered on the court rolls of the manor. If there is a protector of the settlement, who consents by a distinct deed to such disposition of copyhold lands, the consent is declared void, unless the deed of consent be executed on or before the day on which the deed of disposition is executed by the commissioner; and such deed of consent must also be entered on the court rolls.

By section 60, if any commissioner shall, under the act, dispose of any such lands, and only a base fee shall be created by such disposition, such base fee may be subsequently enlarged by there ceasing to be a protector of the settlement.

By section 61, if a tenant in tail entitled to a base fee in lands shall be adjudged a bankrupt when there is a protector of the settlement by which the estate tail was created, and if such lands shall be sold under the former or any future bankrupt acts, and there shall cease to be a protector of the settlement, the base fee shall be enlarged into the same estate into which the same could have been enlarged under the act, if, at the adjudgment of the bankruptcy, there had been no such protector.

By section 62, a voidable estate, which is created in favour of a purchaser by an actual tenant in tail who afterwards becomes bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, is declared to be confirmed by the disposition of the commissioner; if there is no protector of the settlement, or, being such, he shall consent to such disposition, or on there ceasing to be a protector, but not against a purchaser, without notice of the voidable estate.

By section 63, all acts of a bankrupt tenant in tail affecting the estate are declared to be void against any disposition under the act by the commissioner; but (by section 64) subject to the powers given to the commissioner, and to the

estate in the assignees, a bankrupt tenant in tail is declared to retain his powers of disposition of the lands entailed.

By section 65, if the bankrupt be dead at the time of the disposition of the lands by the commissioner, such disposition is declared to have, in certain cases, the same operation as if he were alive.

By section 66, every disposition under the act, by the commissioner, of copyhold lands, where the estate shall not be equitable, is declared to have the same operation as a surrender; and the person to whom such land shall have been disposed of, may claim to be admitted, on paying the fines upon such admittance.

By section 67, the assignees may recover the rents of any lands, of which the commissioner has power to make disposition under the act, and may enforce any covenants in respect of such lands, as the bankrupt could have done. This clause applies to all copyhold lands, but only to such other lands as the commissioner may dispose of after the bankrupt's death.

By section 68, all the provisions of the act are to apply to any estates in Ireland belonging to the bankrupts; and by section 69, all deeds relating to such estates must be inrolled in the court of chancery in Ireland.

By section 71, all the previous enactments apply to lands of any tenure to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner; and the same (by section 72) with respect to any such lands in Ireland, and where the money subject to be invested is under the control of a court of equity in Ireland.

Before the above statute, it was held, that where a remainder-man in tail became bankrupt, the commissioners could only in such a case convey a base fee; and even where a joint commission issued against the tenant for life and the tenant in tail in remainder, it was holden, that the assignees only took an estate for life in the premises, and a base fee in remainder, determinable upon the death of the tenant in tail, and failure of heirs male of his body.¹

Bankruptcy of itself has not the effect of revoking a devise of the bankrupt's real estate, provided the debts are satisfied without having recourse to such estate; for the statute takes the property out of the bankrupt only for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees are mere trustees for the

¹ *Jervis v. Tayleur*, 3 B. & A. 557.

bankrupt, and can be called on to convey back the surplus property to him.¹

The assignees are not necessary parties to the conveyance of an estate, of which the bankrupt was merely seised as a trustee.² Where a purchaser of the bankrupt's estate resells it, before the conveyance is executed to him by the assignees, the court will, at his instance, order the assignees to convey the estate direct to the second purchaser, if no imputation is thrown on the fairness of the first sale, notwithstanding the estate has been re-sold at a profit.³

Where an assignee died, and the bankrupt's real estate became vested in the heir of the assignee, who happened to be an infant,—it was held that a petition to the lord chancellor was necessary, to order the heir, as an infant trustee, to execute any necessary conveyance to a purchaser; but that the application was not made to the chancellor, as sitting in bankruptcy, but under the statute of the 7 Ann. c. 19, relating to infant trustees and mortgagees.⁴

By 2 & 3 Vict. c. 11, s. 12, all conveyances by a bankrupt *bonâ fide* made and executed before the date and issuing of the fiat, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the party had not at the time notice of any prior act of bankruptcy.

By section 13, no purchase from the bankrupt *bonâ fide*, and for valuable consideration, although the purchaser had notice of an act of bankruptcy, is impeachable, unless the fiat shall have been sued out within twelve calendar months after such notice of bankruptcy.

And by 2 & 3 Vict. c. 29, all executions and attachments against the lands and tenements of any bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, are declared to be valid, notwithstanding any prior act of bankruptcy; provided the party at whose suit, or on whose account, such execution or attachment shall have issued, had not, at the time of executing or levying the same, notice of any prior act of bankruptcy.

And for the better security of the purchasers of the bankrupt's estate, it is enacted by the 6 Geo. 4, c. 16, s. 78, that the lord chancellor (and of course, now the court of review to which his jurisdiction in bankruptcy has been transferred,) may, upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, (if the bankrupt

¹ *Chermain v. Charman*, 14 Ves. 380.

² *Ex parte Anderson*, 1 Dea. 585.

³ *Ex parte Boddam*, 1 Rose, 310.

⁴ *Ex parte Genay, Mont. & M.* *Ex parte Kirk*, Beck. 476. 258.

shall not try the validity of the fiat, or if there shall have been a verdict at law establishing its validity) order the bankrupt to join in any conveyance of such estate, or any part thereof; and though he should fail to comply with such order, the bankrupt, nevertheless, and all persons claiming under him, will be stopped from objecting to the validity of such conveyance; and all estate, right, or title of the bankrupt will be as effectually barred by such order, as if the conveyance had in fact been executed by him. But a bankrupt who is disputing the commission at law, cannot (though he has been nonsuited) be compelled to convey.¹ Where the bankrupt wilfully retained possession of a cottage and land, which had passed to the assignees by the bargain and sale, the vice-chancellor made an order upon him to deliver up possession of it within fourteen days after personal service of the order.²

SECTION II.

Of Copyholds.

In order to save the expense of more than one fine to the lord, upon the conveyance of the bankrupt's copyhold estate, that species of property³ was, by the 6 Geo. 4, c. 16, s. 64, expressly excepted out of the general conveyance of the bankrupt's real estates to the assignees. For, if it was conveyed to them along with the freehold property, they could not make a good title to a purchaser, without first being admitted as tenants to the lord, and then surrendering to the purchaser; and as a fine is payable to the lord upon every admittance, there would thus be two fines paid, before the purchaser could be effectually admitted. This inconvenience was adverted to so long ago as in the time of Lord Hardwicke,⁴ who recommended the commissioners to except the copyholds out of the general conveyance to the assignees, and to convey them to a purchaser in the first instance.

And now, by 6 Geo. 4, c. 16, s. 68, the commissioners are directed, by deed indented and enrolled in any court of

¹ *Ex parte Thomas*, 2 G. & J. 278.

² *Ex parte Hargraves*, 2 G. & J. 59.

³ *Druce v. Mann*, 1 Atk. 36; and see *ex parte Harvey*, Buck. 443, *ex parte Holland*, 4 Mad. 483. The practice adopted in consequence of this recommendation of Lord Hard-

wicke, seems, nevertheless, to have been incorrect, according to the strict construction of the 5 Geo. 2, c. 30, s. 26, by which the commissioners were directed to assign *all* the bankrupt's estate to the assignees. And see 1 Christian's B. L. 15, 472.

record, to make sale, for the benefit of the creditors, of any copyhold,¹ or customaryhold lands, or of any interest to which the bankrupt is entitled therein, and thereby to entitle or authorise any person on their behalf, to surrender the same for the purpose of any purchaser being admitted thereto.

And for the protection, also, of the lord, of whom such copyhold estates are held, it is enacted by section 69, that every such purchaser shall, before he enter into or take any profit of the same, agree and compound with the lord for fines, dues, and other services, as theretofore have been usually paid for the same; and thereupon the lord is required, at the next or any subsequent court to be holden for the manor, to grant unto such vendee, upon request, the said copyhold lands, for such estate or interest as shall have been so sold to him, reserving the ancient rents, customs, and services, and to admit him tenant of the same.

By the 3 & 4 Will. 4, c. 74, (the act for the abolition of fines and recoveries,) ss. 59, 66 & 67, certain regulations are made for disposing of the bankrupt's copyhold lands, which are subject to any entail. These have been already specified in considering the mode of conveyance of the bankrupt's estate tail.² Under the provisions of the 1 & 2 Will. 4, c. 56, s. 26, it seems now that the mere appointment of assignees vests in them any copyhold property of the bankrupt's, so as to enable them to maintain ejectment for the recovery of it, and that the entry on the court rolls of the manor is only necessary, to enable them to convey the property to a purchaser.³

If the vendee tenders to the lord a competent fine, which the lord refuses, and will not admit, the vendee may nevertheless enter,⁴ without admittance; for, though a purchaser cannot in general enter and take the profits before admittance, yet this is only a regulation for the benefit of the lord; the estate being out of the bankrupt immediately by the appointment of assignees, and vesting in the purchaser when admitted, by relation from such appointment, so as to avoid any intermediate claims. Thus, if the bankrupt die between the appointment and the admittance of the purchaser, and the custom of the manor is, that the wife of any copyholder, dying *tenant*, shall be entitled to her freebench, yet the wife of the bankrupt in this case will not be entitled to be so endowed.⁵

¹ Of all the former bankrupt acts previous to the 5 G. 4, c. 98, copyholds were only expressly named in the 13 Eliz. c. 7, s. 3.

² See ante, p. 352, a.

³ *Doe d. Brennan v. Glenfield*, 1 Scott, 699. 1 Bing. N. C. 729.

⁴ Stone, 127.

⁵ *Parker v. Bleske*, Cro. Car. 568. Sir W. Jones, 451.

And where a bankrupt was entitled to a copyhold estate, under a devise to the testator's wife for life, remainder to the bankrupt and the heirs of his body, with remainder over, in case the bankrupt should die without issue, or should not survive his mother,—and there was no custom in the manor to entail copyholds,—and the bankrupt survived his mother and had issue, but died without being admitted, and before any bargain and sale was executed by the commissioners,—it was held, that the bankrupt took, under these circumstances, a fee simple conditional at common law; and that the commissioners might execute a valid conveyance of the estate, notwithstanding his death, pursuant to the provision of the 1 Jac. 1, c. 15, s. 17. This provision is contained in the 6 Geo. 4, c. 16, s. 26, which authorises the commissioners to proceed in the commission, when the bankrupt dies after adjudication, as they might have done if he were living.¹

SECTION III.

Of Mortgages.

By 6 Geo. 4, c. 16, *section 70*, if the bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or have deposited any deeds upon condition, or power of redemption at a future day, the assignees may, before the time of the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors.

The assignees, however, cannot, under this section, acquire the legal estate in premises mortgaged by the bankrupt, by making a tender to the mortgagee of the mortgage money and interest, *after* the day of payment mentioned in the condition is passed.²

The assignees have always been considered to be entitled to the equity of redemption of a mortgage made by the bankrupt.³ But they cannot redeem, without paying interest up to the time of redemption.⁴ And where a bankrupt made two mortgages to the same mortgagee of two several estates, and one of the estates was deficient in value, and

¹ *Doe v. Clark*, 5 B. & Ald. 458.² *Vandenanker v. Desbrough*, 2³ *Dunn v. Massey*, 6 Ad. & El.

Vern. 96.

479. 1 Nev. & P. 578.

⁴ 7 Vin. Ab. 100.

the assignee filed a bill to redeem one mortgage only, the court said, that if the assignee would redeem one, he must redeem both.¹

And where a bankrupt mortgaged separately two estates, which were charged with the payment of legacies, and the assignees sold the estates, subject to the unpaid legacies and the mortgages, one of the estates producing 1000*l.* more than the amount of the mortgage on it, and which surplus was sufficient to pay the legacies, but the proceeds of the other estate being scarcely sufficient to satisfy the mortgage on it; it was held, on the application of the mortgagee of the last-mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate.²

So, where the security of one creditor ranges over two funds, and the security of another creditor is confined to one of the funds, the court will marshal the assignees so as to throw the creditor, whose security extends to the two funds, on that fund which is not liable to the debt of the other creditor.³

If a tenant in tail make a mortgage for years, and, after becoming bankrupt, dies without having suffered a recovery, his assignees are entitled to the estate free of the mortgage; for a tenant in tail, without suffering a recovery, can only affect the estate for his life; and after his death the mortgagee's title is consequently at an end.⁴ But, if the mortgage deed in such a case contain a covenant for further assurance, it has been held, that the mortgagee would then be entitled to retain his security against the assignees, on the principle, that they are bound by the same equity as the mortgagor.⁵

A delivery by the bankrupt of the mortgage deed to his attorney is a good delivery of it to the mortgagee, notwithstanding the attorney does not actually deliver it to the mortgagee until after the bankruptcy.⁶

Where the bankrupt mortgaged a public-house, together

¹ *Pope v. Onslow*, 2 Vern. 286; and see *Willis v. Lugg*, 2 Eden's Rep. 78, note. Ex parte *Alsager*, 2 M. D. & D. 328.

² Ex parte *Hartley*, 1 Dea. 286.

³ *Baldwin v. Belcher*, 3 Dru. & W. 173, 2 Com. & Law, 131. Re Cornwall, *ibid.*

⁴ *Beck v. Welsh*, 1 Wils. 276.

⁵ *Pye v. Daubus*, 3 Bro. 594. *Edwards v. Applebee*, cited 2 Bro. 652. This distinction, as Sir W.

Evans has justly observed, does not seem in practice to be very important, as there is never any legal mortgage without a covenant for further assurance; and an equitable mortgage is, *ex vi termini*, held to imply, an agreement to do all legal acts to give validity to the assurance. See Evans's Bankrupt Statutes, 78, note 11.

⁶ *Grugson v. Gerrard*, 4 Younge & C. 119.

with the licence, and after the licence had been suspended for irregular conduct on the part of the bankrupt, the mortgagee sold the premises under the power of sale contained in the deed, and the assignees obtained a new licence in the name of the purchaser, for which the latter paid them 150*l.*; it was held, that the mortgagee could not claim this money from the assignees.¹

Equitable mortgage.] Where a bankrupt deposits a lease as a security for money, without making any mortgage or assignment of it, the *legal estate* is strictly vested in the assignees.² But, as such a deposit amounts to an equitable mortgage, and the assignees have no right to the estate until the money is repaid,³ the court of review will, on petition of the creditor, prevent the assignees from disposing of the legal estate to his prejudice, and will order the lease to be sold for the benefit of the creditors, in the same manner as in the case of a legal mortgage; and the interest which the creditor thus acquires as an equitable mortgagee, may be transferred with the deed to a third person.⁴ Where the purchaser of an equity of redemption in premises, subject to a mortgage term, deposited the purchase deed as a security, and afterwards paid off the mortgage and took a surrender of the term, retaining the deed of surrender in his own possession; it was held that the lien created by the deposit extended to the whole estate, freed from the incumbrance.⁵

So where, between the times of the deposit and the bankruptcy, the entirety of a certain portion of the property was conveyed to the bankrupt in lieu of an undivided share, he paying 100*l.* as a consideration; it was held that the lien of the equitable mortgagee affected the portion conveyed to the bankrupt, and that the assignees had no claim in respect of the 100*l.*⁶

Where a bankrupt being entitled to one-third part of freehold property in his own right, and to another third as heir at law to his brother, deposited the title-deeds with his bankers to secure advances, and the brother's share of the property became assets for the payment of his debts, under

¹ *Manifold v. Morris*, 7 Scott, 404.

² *Mastair v. Roe*, 5 Esp. 105.

³ *Russel v. Russel*, 1 Bro. 269, and cases there cited. Ex parte *Coming*, 9 Ves. 115. Ex parte *Wetherall*, 11 Ves. 398. Ex parte *Heigh*, *ibid.* 403.

⁴ *Hobson v. Mellond*, 2 Mood. & R. 342.

⁵ Ex parte *Bisdee*, 1 M. D. & D. 333.

⁶ *Ibid.*

the provisions of the 11 Geo. 4, and 1 Will. 4, c. 47, s. 9; it was held that the lien of the bankers extended to the two-thirds of the estate, in preference to any claim of the brother's creditors.¹

Where deeds relating to a trust estate were deposited for safe custody with a banking firm, which made advances to one of the *cestui que* trusts, on a parol agreement for a lien on his share, and the *cestui que* trust promised by letter, that as soon as a partition could be effected of the property he would give the firm a security for the full amount of the account; and some time afterwards, the partition having taken place, he signed a memorandum, stating that he had deposited the deeds therein described, as a collateral security for any advance which the firm might make on his account, but the partition deed was not deposited; it was held that the firm were equitable mortgagees of the estates taken in partition, and that the security extended to past as well as to future advances.²

Where a bankrupt deposited with a creditor, as a security for his debt, certain deeds, by which a freehold house, and certain household furniture therein, were conveyed and assigned to the bankrupt, and the memorandum of deposit was, "herewith I hand you the title deeds of my Bognor estate, &c." it was held that those words had reference only to the house, and did not comprehend the furniture.³

Where the bankrupt gave a bond for 5000*l.* to his sister, but, failing to pay the interest due on it, he gave her another bond for 1000*l.* to secure the arrears, and afterwards deposited with her the title deeds of his real estates, "as a collateral security for the bond deeds," and subsequently, in contemplation of the marriage of his sister, the two bonds were, with his consent and privity, settled upon trusts for the intended husband and wife, no reference, however, being made in the settlement to the deposit of the title deeds, and four years afterwards he became bankrupt; it was held, that, as there was no fraud suggested, nor any insolvency proved against the obligor, the settlement was a valid security, and that by virtue of the bonds, the deposit, and the settlement, the trustee of the settlement was an equitable mortgagee of the real estate for the monies due on the bonds.⁴ An equitable mortgagee, who becomes the purchaser under the usual order, and retains the amount of his equitable mortgage out of the purchase money, is bound to perform an agreement of the

¹ *Ex parte Baine*, 1 M. D. & D. 492.

² *Ex parte Farley*, 1 M. D. & D. 683.

³ *Ex parte Hunt*, 1 M. D. & D. 139.

⁴ *Meggison v. Foster*, 2 Younge & C. Ch. Ca. 336.

bankrupt to grant a lease of the property.¹ Where a bankrupt had mortgaged copyhold lands, but the surrender was neglected to be made within the time limited by the custom, and the bankrupt afterwards died, the court of chancery would not permit the assignees to take advantage of the defect.²

Mortgagee's right to rents, &c.] Neither a legal nor an equitable mortgagee is absolutely entitled to the rents of the mortgaged premises until he enters or gives notice to the tenants to pay the rents to him; and the commissioner's order for the sale of the property is not equivalent for this purpose.³ The deposit of title deeds is a sufficient authority to an equitable mortgagee to receive the rents.⁴ It has been held, in one case, that an equitable mortgagee was entitled to the rents from the time of *presenting his petition for a sale*;⁵ in another, that he was not so entitled before the *actual sale*;⁶ it has been since decided that he can only claim them from the date of the *order of sale*, notwithstanding he has previously given notice to the tenants not to pay them to the bankrupt.⁷

But where the equitable mortgagee took possession of the property before the bankruptcy of the mortgagor, on his absconding, and the assignees adopted the agent put in by the mortgagee to manage the property, it was held, that the mortgagee was entitled to the rents from the time of taking possession.⁸

Where, however, the mortgagee of property, which had been some time untenanted and unproductive, consented that the assignee should let the premises, the mortgagee stipulating that his rent was not to be considered as assuming the possession of the premises as mortgagee, and the assignee accordingly let the property and received the rents for seven years, when the property was sold; it was held that the assignee, and not the mortgagee, was entitled to these bye-gone rents, notwithstanding the proceeds of the sale were insufficient to pay off the whole of what was due on the mortgage.⁹

Where certain payments were agreed to be made by an

¹ *Smith v. Phillips*, 1 Keen, 694.

² *Taylor v. Wheeler*, 2 Vern. 565.

³ *Ex parte Living*, 1 Dea. 1.

⁴ *Garry v. Sharratt*, 10 B. & C. 717. *Sumpter v. Cooper*, 2 B. & Ad. 226.

⁵ *Ex parte Bignold*, 2 G. & J. 273.

⁶ *Ex parte Alexander*, 2 G. & J. 275.

⁷ *Ex parte Burrell*, 3 Dea. 76. *Ex parte Thorpe*, 3 Dea. 85. *Ex parte Bignold*, 2 M. & A. 16. *Ex parte Scott*, 3 Dea. 304. *Ex parte Bignold*, 2 D. & C. 398. *Ex parte Ramsbottom*, 4 D. & C. 198. And see *ex parte Kensington*, 2 M. & A. 300.

⁸ *Ex parte Bignold*, 4 D. & C. 259.

⁹ *Ex parte Carr*, 2 M. D. & D. 534.

occupier of the soil, under a parol licence to dig earth and make bricks, it was held, that these payments were in the nature of rent, and that, as such a mortgagee of the premises, was entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which might become due afterwards.¹

An equitable mortgagee of a lease is not liable for the rent, unless he has taken possession of the premises.²

But where it was arranged between the assignees and a mortgagee, previous to the latter obtaining the usual order for sale, that he should be placed in the same situation as if he had given notice to the tenants; it was held that the mortgagee was entitled, under these circumstances, to the crops growing on the estate at the time of the order for sale.³

Where the tenant in possession of mortgaged premises paid rent to the assignees of the mortgagor, though after notice to pay rent to the mortgagee, the court refused to compel the assignees to refund; for a mortgagor, receiving rent, has never been considered a trustee for the mortgagee.⁴

But where the rents had been received by the agent of the mortgagor after the mortgagor's bankruptcy, and after the mortgagee had given notice to the tenants, and were not actually paid over by the agent, it was held, that the assignees could not recover them, but that the agent was justified in paying them to the mortgagee, in reduction of the interest due on the mortgage.⁵

When the mortgagor in possession is, by express contract, tenant at will to the mortgagee, it has been held, that the mortgagee is not entitled to the crops upon the mortgaged premises, at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners.⁶

Where the mortgagor becomes bankrupt after a bill of foreclosure is filed against him, and then a supplemental bill is filed against him and his assignees, the court will not, on the application of the assignees alone, make an immediate decree under the 7 G. 2, c. 20, s. 2, as to the right of redemption, on payment of principal and interest due on the mortgage.⁷ As to the right of a mortgagee to fixtures, see post, "Reputed ownership."

¹ Ex parte *Hankey*, Mont. & M. 247.

² *Moore v. Choat*, 8 Sim. 508, correcting *Flight v. Bentley*, 7 Sim. 149, and see *Sanders v. Benson*, 4 Beav. 350.

³ Ex parte *Barnes*, 3 Dea. 238.

⁴ Ex parte *Wilson*, 2 V. & B.

252. 1 Rose, 444. Ex parte *Carlow*, 2 Dea. 333.

⁵ *Pope v. Biggs*, 9 B. & C. 245.

⁶ Ex parte *Temple*, 1 G. & J. 216; and see *Hodgson v. Gascoigne*, 5 B. & A. 88.

⁷ *Garth v. Thomas*, 1 Sim. & S. 188.

For further information as to creditors holding a legal or equitable mortgage, the reader is referred back to chapter ix. section 6, where the subject has been already fully considered.

SECTION IV.

Of Offices.

Any office of inheritance, or for term of years, which is held by the bankrupt at the time of his bankruptcy, and from which any benefit is derived, will pass to the assignees; but not an office touching or concerning the administration or execution of justice, which is expressly prohibited to be sold by the 5 and 6 Edw. 6, c. 16. The proper course of proceeding in these cases (as recommended by Lord Hardwicke) is for the assignees to settle the price with a purchaser, and then to propose him for the approval of the person having the power of admission, upon which the bankrupt must surrender the office in his favour; otherwise, he may be compelled to do so, under pain of imprisonment.¹

The place of *under-marshal* of the city of London, which is merely an office of police, and which was purchased by a bankrupt, and held *quandiu se bene gesserit*, has been held to be assignable.² So, also, the place of one of the *gentlemen pensioners*,³ as well as the office of taking care of the palace and house of lords, have been holden liable to creditors.⁴

But the office of *serjeant at arms* of the city of London, though it is purchased for a sum of money, and is also holden *quandiu se bene gesserit*, has been determined to be not assignable,⁵ on the ground of its being one that concerned the administration of justice.⁶ And the same with respect to the office of one of the sworn clerks of the *six clerks' office*.⁷ So, the full pay or half pay of an *officer in the army*⁸ has been

¹ 1 Atk. 210. Ambl. 73. 1 C. B. L. 283.

² Ex parte Butler, 1 Atk. 210, 215. Ambl. 73.

³ Ex parte Joyner, 1 C. B. L. 283. Ex parte Gilbee, *ibid*.

⁴ Schellinger v. Blackerby, 1 Ves. 347.

⁵ 1 Atk. 212.

⁶ Not more, however, it is apprehended, than that of *under-marshal*; for an office of police seems as much connected with the administration of justice, as an office

like that of *serjeant at arms*; one may be considered a *criminal*, and the other a *civil* office.

⁷ Bristow's case, 1 Atk. 212.

⁸ Mr. Justice Buller, in one case (*Flarty v. Odum*, 3 T. R. 681,) seemed to think, that though an officer could not assign his pay, yet he might assign such *arrears* of it as were actually due; but in *Catheart v. Blackwood*, (*infra*,) it was principally the *arrears* that seemed to have been in question.

held to be not assignable, and this upon principles of public policy.¹ The place of a *jew broker*, also, in the city of London, has been holden not assignable; but this was considered to be no *office* at all, such a person being merely one of a particular description, and of a limited number, who are licensed as brokers by the court of aldermen.²

SECTION V.

Of Advowsons.

Where the patron of a living becomes bankrupt, the commissioner may sell the *advowson*; and so with respect to a right of next *presentation* to a living. But if the church be void, then the presentation cannot be sold; for the void turn of a church is not *valuable*;³ and the bankrupt, therefore, in that case, is entitled to present. For the 7th section of the 6 Geo. 4, c. 16, enabling assignees to execute powers⁴ vested in the bankrupt, contains an express exception of the right to nominate to any vacant ecclesiastical benefice.

If a clergyman be bankrupt, his living is liable to a sequestration; and the proceeds are distributable amongst his creditors.⁵

SECTION VI.

Of Reversions and Remainders.

As the commissioners are by 6 Geo. 4, c. 16, *sect.* 64,⁶ empowered to convey all the *interest*, to which any bankrupt

¹ *Cathcart v. Blackwood*, 1 C. B. L. 284. In *re Kennedy*, ib. And see *Flarty v. Odium*, 3 T. R. 681. *Lauderdale v. Duke of Montrose*, 5 T. R. 248. *Barwick v. Read*, 1 H. B. 627. *Stone v. Lidderdale*, 2 Anst. 533. Contra *Stuart v. Tinker*, 2 Bl. 640, as to cases of insolvent debtors. But now by the last Insolvent Act, 1 & 2 Vict. c. 110, s. 56, a certain portion only of the pay of an insolvent officer in the army or navy can be assigned, under particular restrictions, for the benefit of his creditors.

² Ex parte *Lyons*, Ambl. 89;

and see an able note of Sir W. Evans, in his Collection of the Statutes on Bankruptcy, B. L. 15, as to what offices are and are not assignable under a commission, in which he expresses a doubt that Lord Hardwicke's decision in *ex parte Butler*, *supra*, will not stand the test of fair and deliberate judicial inquiry.

³ *Gibs*. 794. 1 Burn's Ecclesiastical Law, 125.

⁴ See post, 362.

⁵ Ex parte *Meymott*, 1 Atk. 200; but see ante, p. 20.

⁶ Ante, 348.

is entitled in any lands or hereditaments, and which he may by law dispose of, it seems to follow, that they may convey a *reversion*, or *remainder*, of the bankrupt (as well as lands in possession), or indeed any future interest which is vested in the bankrupt at the time of the issuing of the fiat, such as a term to commence *in futuro*.¹

Therefore, where an estate was conveyed to trustees, upon trust to permit the same to be occupied by G. for his life, and after his death by the bankrupt for his life, with remainders over, and it was provided that the person who should be entitled to the occupation of the mansion-house, should reside and dwell therein, and use the name and arms of G., upon pain of forfeiting all benefit under the settlement, and G., the first tenant for life, did not die until many years after the bankrupt had obtained his certificate, and the bankrupt, upon G.'s death, entered into possession of the property; it was held that the bankrupt had such a life interest in remainder as passed to his assignees, liable to be defeated by his default to comply with the conditions of the settlement. And the court gave its sanction to an agreement entered into between the bankrupt and the assignees, by which a reasonable allowance was made to him, to induce him to serve the estate, by continuing to reside in the mansion-house, and fulfilling the conditions of the settlement.²

So, where the bankrupts took a reversionary interest in some property, charged with the payment of debts, as residuary devisees under their father's will, of which also they were constituted executors, and the testator had been dead for forty years, it was held, that in the absence of all evidence of any outstanding debts, the assignees had a full right to dispose of this property, and that the bankrupts were bound to join in the conveyance.³

SECTION VII.

Of Powers.

When a *power of appointment* was vested in a bankrupt, it seems to have been for some time a point unsettled,

¹ 2 Com. Dig. 25. Good. 88.

² Ex parte *Bolton*, 1 M. D. & D.

³ Ex parte *Goldeney*, 3 Dea. 667.

whether the bargain and sale of the commissioners had the same operation as a due execution of the power by the bankrupt.¹ In one case it was decided, that a bankrupt, who had an absolute power of appointment, could not be compelled by a decree, on a bill in equity filed against him, to execute such power in favour of his assignees.² In a subsequent case, however, in the King's Bench, where the bankrupt was seized of a life estate with a general power of appointment, with remainder in default of appointment to himself in fee, and after his bankruptcy he executed the power, it was held that (all his interest having passed to the assignees by the assignment from the commissioners) the appointment was void, and that his assignees had a sufficient legal estate to maintain an ejectment.³ And in a former case, too, where an estate was limited to the bankrupt for life, with intervening uses, and remainder to himself in fee, with power to change the uses; the remainder in fee was held to vest in the assignees, and his power of revocation to be gone.⁴

So where, by a marriage settlement, the husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, &c.; remainder to children in tail, in default of appointment, remainder to husband in fee, in default of issue; the husband became bankrupt, and conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate, and the assignees sold the life estate to the bankrupt's mother;—it was held, that the son took nothing under the appointment, but was only entitled to an estate tail under the original settlement.⁵

But all question, as to powers of appointment vesting in the assignees, is now set at rest by the 77th section of the 6 Geo. 4, c. 16, which provides that all powers vested in any bankrupt, which he might legally execute for *his own benefit*, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees, for the benefit of the creditors, in such manner as the bankrupt might have executed the same. And, independently of this express provision as to powers of appointment, the 78th section (as we have seen) also enables the lord chancellor to

¹ Sugden on Powers, 154.

And see *Hale v. Escott*, 2 Keen,

² *Thorpe v. Goodall*, 1 Rose, 43.

444.

³ 17 Ves. 270.

⁴ Loft, 71.

⁵ *Doe v. Britain*, 2 B. & A. 93.

⁶ *Badham v. Mee*, 7 Bing. 695.

order the bankrupt to join in any conveyance to a purchaser of any part of the bankrupt's estate.

Where a bankrupt, having a power of appointment over money, to be executed only by will, made his will disposing of the property, and then became bankrupt and obtained his certificate, and died without revoking his will; it was held, that the appointee under the will was a trustee for the creditors of the bankrupt, who had become such after he had obtained his certificate.¹

With respect to *powers of attorney*,—it has been determined, that a power of attorney, given by the bankrupt to receive money for him, is revoked by his bankruptcy;² and it would seem, also, that a power of attorney given to a bankrupt for the same purpose, would be equally revoked.³ But when the power has been given by a bankrupt to do a mere formal act,—such as to sign an indorsement upon the register of a ship when she returns home, (which the bankrupt indeed might be compelled to do himself, notwithstanding his bankruptcy)—in such a case, the power of attorney has been held not to be revoked.⁴

SECTION VIII.

Of a Possibility, or Contingent Interest.

The words "*possibility of profits*" are not contained in the 6 Geo. 4, c. 16, as they were in the 5 Geo. 2, c. 30, s. 1, where this was included among other species of property, which the bankrupt was compelled to give up in the disclosure of his effects. But the provision of that statute vested no *power in the commissioners* over this description of the bankrupt's property, nor, indeed, gave any direction as to what they were to assign,—imposing only a particular penalty on the bankrupt, for not disclosing his effects in the manner there stated. The words "*possibility of profit*," therefore, afforded nothing more than an argument, as to what the intent of the legislature was in those provisions that related to the assignment of the commissioners of the

¹ *Tinney v. Andrews*, 6 Madd. 264.

² *Hovill v. Lethwaite*, 5 Esp. 158.

³ *Hudson v. Granger*, 5 B. & A. 31.

⁴ *Dixon v. Ewart*, Buck. 94.

3 Meriv. 322; and see *ex parte Macdonnell*, Buck. 399. *Ex parte*

Stewart, 1 G. & J. 344.

bankrupt's general property,—and on the strength of which it has been decided, that all property of the bankrupt, that was included under the words “possibility of profit,” passed to the assignees.¹ Notwithstanding those words are omitted in the 6 Geo. 4, c. 16, (for which, however, there does not seem to be any particular reason assigned) the learned author of the act considered,² from its general tenor and purport—from the provision at the conclusion of it, that it should be construed beneficially for creditors,—and from the extensive words³ enabling the commissioners generally to deal with and assign the bankrupt's property,—that the construction of the statute would be as extensive in this respect as if those words had been retained in it.

But, as a possibility (coupled with an interest) is by law devisable,⁴ it would seem to follow on that ground alone, that it may be also assigned, with the other disposable property of a bankrupt, for the benefit of his creditors. And, where there was a devise to such of the children of A. as should be living at her death,—and A. had issue (amongst others) B., who became a bankrupt, and got his certificate allowed,—after which A. died; it was held, that the assignees in this case were entitled to the bankrupt's interest; for that he himself might in his mother's lifetime have released such interest,—and that the commissioners were therefore enabled to assign it.⁵

The possibility, however, must be such an interest as *can* be assigned or released. Therefore the mere possibility, or *expectancy*, of inheriting an estate generally as heir at law,—there being no *persona designata*,—cannot be assigned by the commissioners. So that if an estate, under these circumstances, comes to the bankrupt after he has obtained his certificate, neither the commissioner, nor the assignees, have any control over it.⁶ But, if the estate descends to him *before his certificate*, it will, in that case, pass to his assignees under the 64th section of the 6 Geo. 4, c. 16.

A *policy of insurance* effected by a bankrupt on his own life, passes to his assignees, however small the apparent value of it may be.⁷ But where the bankrupt had assigned

¹ *Thorpe v. Goodall*, 1 Rose, 44.

² Lord Henley's B. L. 218.

³ Section 135.

⁴ *Roe dem. Perry v. Jones*, 1 H. B. 30. *Jones v. Roe*, 3 T. R. 88.

⁵ *Higden v. Williamson*, 3 P. Wms. 132.

⁶ *Moth v. Frome*, Amb. 394;

and see *Carleton v. Leighton*, 3 Meriv. 671.

⁷ *Schondler v. Wuce*, 1 Camp. 487.

a bond to a creditor to secure the payment of a debt, with a proviso for redemption, and the balance of the debt remaining unpaid at the time of the bankruptcy was larger than the amount of the bond, it was held that the bankrupt had no possibility of interest to pass to his assignees.¹

SECTION IX.

Of a Voluntary Conveyance.

(See ante, 71, as to a *fraudulent conveyance being an act of Bankruptcy*; and see post, 439, as to *Personal Property fraudulently delivered in contemplation of Bankruptcy*.)

By the 6 Geo. 4, c. 16, s. 73, if any bankrupt, *being at the time insolvent*,² shall (except upon the marriage of any of his children, or for some valuable consideration,) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, &c., the commissioners have power to sell and dispose of the same; and such sale is declared to be valid against the bankrupt, and such children and persons claiming under him.

A voluntary settlement, or purchase, for a *wife*, made *after marriage*, has been held to be included in this power given to the commissioners, upon the construction of the words "children, or *any other person*,"—which are copied by the above section from a former³ act. And where a

¹ *Dangerfield v. Thomas*, 1 Per. & D. 287.

² These words were not in the 1 Jac. 1, c. 15, s. 5, from which this section is taken, and which applied to *all* cases of a conveyance without consideration, whether the bankrupt was insolvent, or not, at the time. So that, before the present statute, in order to make a transaction of this kind void against creditors, it was not essential that the party making the conveyance should have been *indebted* at the time; (*Fryer v. Flood*, 1 Bro. 160. *Glaister v. Hewer*, 8 Ves. 195. 9 Ves. 12. 11 Ves. 377;) though it was, of course, necessary, as it is now, that he should have

been then a *trader*. *Crisp v. Pratt*, Cro. Car. 548. *Lilly v. Osborne*, 3 P. Wms. 298; and see *Pickstock v. Lyster*, 3 M. & S. 371. *Goss v. Neale*, 5 Moore, 19. It has lately been decided, also, under the 13 Eliz. c. 5, that a voluntary settlement by a party largely indebted, who becomes insolvent within three years, is void; and that under these circumstances it is not necessary to prove that the party was at the time of the settlement in a state amounting to insolvency. *Townsend v. Westacott*, 2. Beav. 340.

³ 1 Jac. 1, c. 15, s. 5. *Tucker v. Cosh*, Styles, 288. *Glaister v. Hewer*, 8 Ves. 195. 9 Ves. 12. 11 Ves. 377.

deed, by which the bankrupt conveyed his real estate to trustees for the benefit of his wife and children, was expressed to be made "in consideration of 5s. and other valuable considerations,"—Lord Hardwicke said, that this did not oblige the court to hold it, at all events, to be for a valuable consideration, and could at most only admit the party into proof, that there were other valuable considerations; and he decreed that the trustees, in this case, should convey to the assignees¹ of the bankrupt. But a covenant by a husband to secure to his wife an annuity during her life, in case she should survive him, is a sufficient consideration to support the grant of an annuity from the wife's father, who afterwards became bankrupt.²

Where a deed was made by an executrix before an act of bankruptcy, for securing out of the trust-moneys (in her hands at the time of the deed) the fortunes of the *cestui que trusts*, it was held good against creditors.³ But where an administrator executed a conveyance to two persons, for the payment of 1500*l.* each (given to them by the intestate), it was held fraudulent as against creditors,—unless it could be proved, that the administrator had assets in his hands belonging to the intestate at the time of executing the conveyance.⁴

If a trader make a voluntary conveyance, in consideration of natural affection, and he be not indebted at the time to any person, nor in treaty with any one for the sale of the lands conveyed, such a conveyance, it has been held, would have no badge of fraud about it; but, if the party be indebted, or in treaty at the time for the sale of the lands, it would then be considered fraudulent.⁵ A conveyance, also, made to secure the debt of another person, is not fraudulent against creditors. Therefore, where a father, at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee,—the vice-chancellor held, that this was not a voluntary conveyance without consideration.⁶

And a conveyance made to a creditor for a valuable consideration, sufficiently strong in itself to influence the debtor to make it, has been held not voluntary, within the Insolvent Act of 7 Geo. 4, c. 57, s. 32, although part of the consideration consisted of a pre-existing debt.⁷

¹ *Walker v. Burrows*, 1 Atk. 93.

² *Ex parte Draycott*, 2 G. & J. 283.

³ *Cock v. Goodfellow*, 10 Mod. 490.

⁴ *Bateman's case*, 1 Mod. 76.

⁵ *Style*, 446.

⁶ *Ex parte Hearn*, Buck. 165.

⁷ *Margerson v. Saxton*, 1 Y. & C. Exch. Ca. 525.

A deed of assignment by an insolvent of all his effects, for the benefit of his creditors, executed during his imprisonment, without consideration, and without pressure from any creditor, is voluntary, was held to be void under the 7 Geo. 4, c. 57, s. 32.¹

But a voluntary conveyance, though void as against the creditors of a bankrupt, has been holden good for all other purposes.² And a voluntary bond, being valid as between the parties, when it is surrendered by the obligee for a substituted bond from the obligor, has been determined to be a good consideration for such substituted bond, even against creditors,—unless, indeed, the bond was given with a fraudulent design to substitute a valid for an invalid security.³

In order to support the validity of a deed impeached as a voluntary conveyance, it is not necessary for a creditor to prove pressure by him of the bankrupt, it being for the assignees, who seek to avoid the security, to make out that it was the voluntary act of the bankrupt.⁴

SECTION X.

Of an Executory or Beneficial Contract.

There is some difficulty (from a review of the cases in the books) in determining what interest the assignees take in a covenant, or agreement, entered into by a lessor with the bankrupt for the renewal, or the granting, of a lease. In one case, it was held, that the assignees were not entitled to the specific performance of such agreement.⁵ But this appears to have been decided principally upon the authority of another case, which has been very much impugned, and in the report of which there are indeed two wholly contradictory statements. In one of these,⁶ it is laid down, that equity will not compel a lessor, who had covenanted with a bankrupt to renew a lease, to renew in favour of the assignees; and in another report of the same case,⁷ it is stated to have been holden, that such a covenant *was* assignable in law. In a subsequent case,⁸ Mr. Justice Buller doubted the authority of the first-mentioned report of this

¹ *Binn v. Tinsley*, 3 Nev. & P. 88.

² *Ex parte Bell*, 1 G. & J. 282.

³ *Ex parte Berry*, 19 Ves. 218.

⁴ *Doe dem. Lamb v. Gillett*, 1 Tyr. & G. 14. 2 Cr. M. & R. 579.

⁵ *Moyes v. Little*, 2 Vern. 194.

⁶ *Drake v. Mayor of Exeter*, 1 Ch. Ca. 71. 1 Nels. 102. 1 Eq. Ab. 53.

⁷ *Ibid. Freeman*, 183.

⁸ *Smith v. Coffin*, 2 H. B. 444.

case, and said he did not see why a covenant for the renewal of a lease, of which a profit might be made, might not be assigned; and Mr. Justice Heath said, that he thought the case cited from Vernon a very strange one; for, that a covenant to renew a lease ran with the land.

Bankruptcy, indeed, does not seem to operate as an *actual discharge* of such a contract; though it may depend upon many circumstances, whether a court of equity will decree a specific performance of it in favour of the assignees.¹ In one case it was said, that a specific performance would not be decreed, merely to give up the house to the assignees.² And Sir William Grant, in a later case, (in which, however, the point was not expressly before him,) doubted whether assignees could compel a landlord specifically to perform an agreement to grant a lease to a³ bankrupt—particularly where such an agreement contained a stipulation, that the intended lessee should not assign. Lord Loughborough also observed in *Brooke v. Hewitt*, that it must be a very strong case that would induce the court to carry into execution an agreement between landlord and tenant, (the estate not being executed at law,) where the person who was to become the tenant had become a bankrupt; and he added, that in such a case, the court would consider, whether it would put any terms upon the assignees to make them do equity, and dispose of the lease to a proper and responsible person; and that, as the covenant of the bankrupt must, of course, be of less value than if his bankruptcy had not intervened, the assignees would be ordered to enter into all the covenants.⁴

If, however, a party contract to grant a lease, merely for the *personal accommodation of the bankrupt*, then it is clear that the assignees are not entitled to the specific execution of it; for to hold the contrary, would be against the manifest intention of the parties, as well as the justice of the case, in that particular instance.⁵

With respect to any contract, which the bankrupt may have entered into, for the *purchase* of any estate or interest in land, it is provided by the 46th section of the 6 Geo. 4, c. 16, that the vendor, or any person claiming under him, (if the assignees shall not, upon being required, elect whether they will abide by and execute such agreement, or

¹ *Brooke v. Hewitt*, 3 Ves. 253.

² *Willingham v. Joyce*, 3 Ves. 168.

³ *Wetherall v. Geering*, 12 Ves. 513.

⁴ 3 Ves. 253.

⁵ *Flood v. Finlay*, 2 Ball & B. 9.

abandon the same,) may apply by petition to the lord chancellor; who may, thereupon, order the assignees to deliver up the agreement, and the possession of the premises to the vendor, or person claiming under him, or may make such other order as he shall think fit. As to any agreement, therefore, of the bankrupt for the *purchase* of lands or tenements,—there can be no doubt, (from the wording of the above section,) that it admits a right in the assignees to enforce the performance of a contract of this description against the vendor, if it is thought beneficial to the interests of the creditors to do so.

The provision also, as to the election of the assignees in the above section, appears to proceed upon the broad principle, that they are entitled to the benefit of *every* covenant or agreement of any description made with the bankrupt¹ before his bankruptcy. Accordingly, it has been holden, that lands previously articed to be *sold* by a bankrupt pass to the assignees, together with the benefit of the contract, and that they can compel the purchaser to a specific performance;² and unsatisfied judgments against the bankrupt, in such a case, have been also holden to be inoperative against the title. So, where the bankrupt had made a conveyance of all his property to trustees for the benefit of his creditors, under which the trustees contracted to sell certain lands to the defendant, and they afterwards filed a bill against him for specific performance, but, before answer, a commission of bankruptcy was issued out against the bankrupt, upon which his assignees filed a supplemental bill to enforce the contract; it was held in this case, that, though the conveyance to the trustees was itself an act of bankruptcy, yet that the assignees might compel the performance of the contract made under it.³ It seems, too, that the assignees may adopt any contract which the bankrupt enters into even *after* the act of bankruptcy (if such contract be beneficial to the estate), and may enforce it against the person who has so contracted with the bankrupt.⁴

Where the bankrupt had bought some freehold property by auction, and had paid a deposit of 20*l.* per cent. on the amount of the purchase money, but there being some dispute about the title, the purchase was not completed before the bankruptcy, and the vendor petitioned that the assignee might be ordered to deliver up the agreement; a special

¹ And see *Whitworth v. Davis*, 1 V. & B. 145. *Sloper v. Fish*, 2 V. & B. 145.

² *Sharpe v. Roahde*, 2 Rose, 192.

³ *Goodwin v. Lightbody*, 1 Daniell, 153.

⁴ *Buller v. Carrer*, 2 Star. 433.

order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit money.¹

The right of suing in an English court, upon a contract made by the bankrupt in England with a person resident in England, passes to the assignees under an Irish commission of bankrupt.²

SECTION XI.

Of the Estate of the Wife, and Property settled on the Bankrupt's Wife and Children.

The assignees are entitled to the same interest in all the property of the *wife* of the bankrupt, as he himself possessed at the time of his bankruptcy. For the sake of compendiousness, it is proposed to include in this section the consideration of the law, as it affects both the *Real* and *Personal* estate of the wife.

And first, as to her *Real estate*:—

If the bankrupt be seized of lands in right of his wife, the assignees are entitled to them during the coverture.³

So, a right of entry vested in husband and wife, in right of the wife, passes to the assignees of the husband, if he become bankrupt.⁴

Dower.] When the wife, however, is entitled to *dower* in her husband's lands, this right is not affected in any way by his bankruptcy.⁵ And a provision made previous to the marriage in bar of dower, if precarious and uncertain, does not bar the wife. As, where it was provided by a settlement, that the wife should be entitled to such personal estate as the husband *might die possessed of*, according to the custom of London, and the husband afterwards became bankrupt; the wife was held entitled to dower in this case against the claim of the assignees.⁶ But where a bankrupt, before he was seized in possession of lands, made a voluntary settlement of them after his marriage, in trust for his wife and children; it was held, that the settlement, though void against creditors, subsisted for the benefit of the wife and

¹ Ex parte Bridger, 1 Den. 581.

⁴ Michell v. Hughes, 6 Bing.

² Ferguson v. Spencer, 1 Man. & G. 987.

689.

⁵ Good, 90. Stowe, 163.

³ 2 Com. Dig. Bankrupt D. 11.

⁶ Smith v. Smith, 5 Ves. 169.

children in the event of any surplus, and that the wife (never having been entitled to dower in these lands, by reason that the settlement was made before the husband was seised of any estate in possession) could not claim dower against the creditors by force of the bankruptcy.¹

And where an attendant term became vested in the wife of the bankrupt (who was the owner of the inheritance), as the administratrix of the trustee, after which the bankrupt died; it was held, that she was not entitled to dower, and that she was bound to assign the term to a purchaser, to whom the assignees had sold the estate; for, as she would have no right to dower, if the term were vested in another person, the mere circumstance of its being vested in her will not give her that right.²

Lands devised and settled for her separate use.] Where lands are devised in fee to the wife for her separate use, though there are no trustees appointed, yet the devised premises are not subject to the bankruptcy of her husband; for the testator, having a power to devise the premises to trustees for the separate use of the wife, the court, in compliance with his declared intention, will supply the want of them, and make the husband trustee. And in such a case, as the assignees (who claim under the husband) can have no better right than he had himself, the court will order them to join in a conveyance to a trustee for the separate use of the wife.³ So where a testator devised and bequeathed two freehold houses to the bankrupt's wife, with all the furniture in one of the houses, "for her own sole use and benefit," it was held that these words applied to the furniture as well as the house, and that she was entitled against the assignees to the whole of the furniture for her separate use.⁴ But a trust for the wife's "own use and benefit," does not amount to a trust "for her separate use."⁵ In all cases, however, where the bankrupt would, from the circumstances, be considered as a trustee for his wife, his assignees will be held to be trustees in like manner. As where, in a marriage settlement, an estate was intended to be settled to the separate use of the wife during life, but by mistake was limited to the use of the husband for life, and the husband gave a note under his hand to the trustee, that the wife

¹ *Ex parte Bell*, 1 G. & J. 263.

² *Mole v. Smith*, Jacob, 490.

³ *Bonnet v. Davis*, 2 P. Wms.

316. *Kirk v. Paulin*, 7 Vm. Ab. 95; and see post, 377, et seq.

⁴ *Ex parte Killick*, 5 M. D. & D. 480.

⁵ *Beales v. Spencer*, 2 Younge & C. Ch. Ca. 651.

should take the estate to her separate use, according to the original intention of the parties; the court held, in this case, that the assignees of the husband must be considered as trustees for the wife, as they took the estate subject to the same right as she was entitled to against the bankrupt.¹ And a court of equity will in every case supply legal defects in marriage articles executed by a trader, and compel assignees to carry the articles into execution.² Thus, where a settlement was by lease and release, and the lease for a year was lost, the settlement was nevertheless held good against the assignees of the husband; as the release amounted to a covenant to stand seised.³

But the court of review, it seems, has no power to order a trustee, who refuses to submit to the jurisdiction, to convey an estate to the assignees which was devised to the trustee for the use of the bankrupt's wife.⁴

Where the wife's fortune was by articles *before* marriage settled to the use of the bankrupt for life, but, if he failed in the world, the trustees were then not to pay the proceeds to him, but apply it to the separate maintenance of the wife and children,—the court held, that the settlement was good against the assignees, it not being a provision out of the bankrupt's estate, but the settlement of *her own* property.⁵

So, where a testator bequeathed his residuary estate to trustees, and after making a provision out of it for the benefit of his son for life, and after the son's death for his wife and child, directed that if his son should charge the interest to which he was entitled for life, or agree so to do, or commit any act whereby the same or any part thereof might, if the absolute property thereof was vested in him, be forfeited to or become vested in any other person, then the trustees should pay and apply the interest for the maintenance and support of his son, and any wife or children he might have; and some years after the testator's death the son became bankrupt; it was held that the trust for the benefit of the son and his wife and children was valid, and that the assignees were not entitled to any part of the provision.⁶

Where by a marriage settlement, in consideration of 1500*l.*, the property of the wife, which the bankrupt was to

¹ *Tyrrell v. Hope*, 2 Atk. 557.

² 2 Atk. 557. *Brown v. Jones*, 1 Atk. 188. *Jordan v. Savage*, 2 Eq. Ca. Ab. 102. *Bosvil v. Brander*, 1 P. Wms. 459.

³ *Brown v. Jones*, *supra*.

⁴ *Ex parte Abbot*, 1 Deac. 338.

⁵ *Lockyer v. Savage*, 2 Str. 946.

⁶ *Godden v. Crouchurst*, 10 Sim. 642.

have for his own use, and also of a vested interest to which she was entitled in the sum of 4000*l.* on the death of a tenant for life, the bankrupt covenanted that his heirs, executors, and administrators should, immediately after his decease, pay to the trustees of the settlement the sum of 4000*l.*, to be held upon certain trusts for the wife and the children of the marriage; but there was a proviso that the heirs, &c. should not be bound to pay the 4000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts; and the husband became a bankrupt before the death of the tenant for life, but he survived the tenant, and afterwards died before the wife's share was payable; it was held that the husband's assignees were not entitled to receive the share without performing the covenant.¹

But where the wife's estate was by settlement vested in trustees, to assign after the marriage a part to the husband, and in the event of her dying in his lifetime without issue, then to be divided in a particular mode; and the husband covenanted, that in that event, he would within three months after her decease transfer 500*l.* to the trustees, for the sole use of her next of kin, but he became a bankrupt in her lifetime; it was held, in this case, that the 500*l.* (so covenanted to be transferred) being only contingent at the time of the bankruptcy, the whole of the trust fund vested in the assignees, and that they were not subject to any equity for the payment of the 500*l.*²

Where property was settled on J. R. by his father, until he should take the benefit of the insolvent act, and then the trustees were during his life to apply it in such manner and to such persons, for the subsistence of J. R. and his family, as the trustees should think proper; and after his decease, upon trust for such persons as he should appoint; and in default of appointment, in trust for his children; and J. R. took the benefit of the insolvent act, having three children, but his wife was dead; it was held, that the children became entitled to three-fourths, and the assignees to one-fourth, of the life interest of J. R.³

Maintenance out of her own property.] The wife of a bankrupt has, in equity, a right in all cases to an adequate provision out of her own property. Therefore, where such

¹ *Corbie v. Free*, 1 *Craig & Ph.* 64.

² *Brandon v. Brandon*, 3 *Swanst.* 327.

³ *Rippon v. Norton*, 2 *Beav.* 63.

property cannot be got at by the assignees, without the intervention of the court of equity, the court will compel them to make a competent settlement upon her,¹ before it will permit them to get possession of the property, unless the wife be otherwise properly provided for.² And though a settlement has been made, previous to the marriage, of part of the wife's property to her separate use, it does not bar her claim to a further settlement out of newly-acquired property.³ The practice in these cases has been, to refer it to the master to settle what is a proper maintenance,—having regard, on the one hand, to any prior settlement of other property made by the husband—and on the other, to any other property possessed by the husband in right of his wife.⁴ This equity of the wife (to a provision out of her property) attaches on the filing of the bill, which gives a court of equity jurisdiction over the property.⁵ And where the property is a subject of *equitable* cognizance, it does not seem to be material whether the wife, or the husband, or his representatives, or general assignees, come for the aid of the court.⁶ If the entire property, or that portion of it which exists at the time of her husband's bankruptcy, is not more than sufficient to maintain her, the court has in some cases ordered her to receive the whole for her separate use,—as in the case of an annuity, to which she is entitled at the time of the bankruptcy.⁷ But where it is more than sufficient for her maintenance, in no case will the whole be given.⁸ Thus, where the net income of the property she brought to her husband amounted to 225*l.* a year, an allowance of 175*l.*

¹ *Parker v. Dykes*, Davis, 281. *Holland v. Culliford*, 2 Vern. 662. *Jacobson v. Williams*, 1 P. Wms. 382. *Bosvil v. Brander*, *ibid.* 458. *Grey v. Kentish*, *ibid.* 280. *Jewson v. Moulson*, 2 Atk. 417. *Worrall v. Marlar*, cited 1 P. Wms. 459. Cox, 153. 2 Dick. 647. *Pryor v. Hill*, 4 Bro. 139. *Watson v. Mas-call*, cited 1 P. Wms. 458. *Saddington v. Kinman*, 1 Bro. 44. *Freeman v. Parsley*, 3 Ves. 421. *Pringle v. Hodgson*, *ibid.* 617. *Brown v. Clark*, *ibid.* 166. *Lumb v. Milnes*, 5 Ves. 517. *Harrison v. Buckle*, 1 Str. 238. *Adams v. Peirce*, 3 P. Wms. 12. Ex parte *Beilby*, 1 G. & J. 167. Ex parte *Hall*, *ibid.* Carr v. Taylor, 10 Ves. 574. *Bassivi v. Serra*, 3 Meriv. 674

² Ex parte *Thompson*, 1 Dea. 90.

³ *Burton v. Dean*, 2 Ves. 607.

⁴ *Green v. Otte*, 1 Sim. & St. 250. *Beales v. Spencer*, 2 Y. & C. 651.

⁵ *Steinmetz v. Halkin*, 1 G. & J. 64; and see *Macauley v. Philips*, 4 Ves. 15. *Murray v. Lord Elibank*, 10 Ves. 90, but see also *De la Garde v. Lempriere*, 6 Beav. 344.

⁶ See Mr. Cor's note, 1 P. Wms. 459. *Lord Elibank v. Montolieu*, 5 Ves. 737. 1 Roper Husb. & W. 257.

⁷ Ex parte *Coysegame*, 1 C. B. L. 265. 1 Atk. 192. *Onsell v. Probert*, 2 Ves. 680.

⁸ *Wright v. Morley*, 11 Ves. 20. *Beresford v. Hobson*, 1 Mad. 362. *Green v. Otte*, *supra*.

a year was ordered;¹ and in some cases, where the property is large enough, it has been divided equally between the wife and the assignees.²

It seems, however, that the court of chancery will not, *after the death of the wife*, extend this equity for a provision out of her estate to the issue of the marriage, where *no claim* has been made by the *wife* during her lifetime; for the right to such a provision is merely *personal* to the wife, and the court acknowledges no *original* title in the children, who can claim only that provision³ which the wife thinks fit to secure to herself. She may, even at any time before the execution of the settlement (by consent in court), waive the settlement, and defeat the children.⁴ But, if she do not waive it, and the court has *once jurisdiction* over the property by the filing of the bill (either by the wife, or by any other person,⁵ the intended settlement will, in that case, upon her death, enure for the benefit of her children. For an *actual settlement* is not necessary to give title to the children after the death of the wife: as, if there be a *decree* in a cause, referring it to the master to approve of a proper settlement for the wife and children, and the wife die before any proceeding under the decree, the settlement must still be made for the children.⁶ And it has also been decided, that the filing of a bill by an executor, though the wife dies before answer, is sufficient to entitle the children to the benefit of the settlement.⁷

If the assignees, however, can get possession of the wife's property, without calling for the interposition of a court of equity, it has been considered doubtful whether the court would, in such a case, interfere to assist the wife.⁸ But the court of chancery has frequently granted injunctions, to stay proceedings of the husband in the ecclesiastical court for the recovery of a legacy to the wife, until a proper settlement has been made.⁹

¹ *Ex parte Thompson*, 1 Dea. 90.

² *Worrall v. Marlar*, *Browne v. Clarke*, *Carr v. Taylor*, *supra*. *Goose v. Davis*, cit. 1 Mad. 375. *Ex parte Newham*, 1 G. & J. 40.

³ *Hearle v. Greenbank*, 3 Atk. 717. *Scriven v. Tubley*, Amb. 509. 2 Eden, 337. *Lloyd v. Williams*, 1 Mad. 453.

⁴ *Murray v. Lord Elibank*, 10 Ves. 88. 91.

⁵ 1 G. & J. 64, but see *De la Garde v. Lempriere*, 6 Beav. 344.

⁶ *Ibid. Martin v. Mitchell*, cit. 10 Ves. 89. *Rouse v. Jackson*, 2 Dick. 604.

⁷ *Steinmetz v. Halthin*, 1 G. & Y. 64, but the contrary was held in *De la Garde v. Lempriere*, 6 Beav. 344.

⁸ *Adams v. Pierce*, 3 P. Wms. 11. *Willats v. Cay*, 2 Atk. 67. *Jewson v. Moulson*, 2 Atk. 420. *Milner v. Colmer*, 2 P. Wms. 641. *Winch v. Page*, Bunb. 80. Prec. Ch. 548.

⁹ *Gardener v. Walker*, 1 Str. 503. *Jewson v. Moulson*, *supra*.

Settlement of husband's lands.] Where a settlement is made of the husband's property upon the wife *before* marriage, it will be good against the assignees, for marriage itself is a consideration: therefore where the bankrupt on his marriage settled an estate in trust to pay the rents "unto or for the maintenance and support of the bankrupt, his wife and child, or otherwise, if the trustees should think proper to permit the same to be received by the bankrupt during his life, without power for him to charge the same;" it was held, that a trust had been created for the maintenance and support of the wife and child out of the property, during the bankrupt's life, and that his assignees took, only, subject to this trust.¹ A settlement of the husband's property, also, is equally good, if made *after* marriage, provided it be upon payment of money as a portion, or even in consideration of an agreement to pay money, if it be afterwards paid pursuant to the agreement.² And if a bankrupt, previous to his marriage, covenant to settle specific lands upon his wife, and die without performing the covenant, the court will compel the assignees to carry the³ settlement into execution.

Where a man, who is *not a trader, and not indebted at the time*, purchases lands and settles them to himself, and his wife and children, and afterwards enters into trade and becomes bankrupt, the settlement, in such a case, is good against the creditors.⁴ But, where a purchase was made by *a trader who was indebted* at the time, in the joint names of himself and his wife, and he afterwards became a bankrupt; the wife, in this case, (before the 6 Geo. 4, c. 16, s. 73) was holden not entitled to any interest in the property.⁵ And so, where the purchase was made even with the wife's money, if it was previously received by him, and disposable at his own, and the receipt of the money was not connected with the purchase, nor the husband bound by any agreement with a trustee.⁶

But now it is apprehended, that, to bar the claims of the wife, the party must not only be *indebted*, but must also be *insolvent* at the time of the purchase, according to the construction of the 73rd section of the 6 Geo. 4, c. 16,

¹ *Page v. Way*, 2 Beav. 20.

² *Brown v. Jones*, *supra*, 1 C. B. L. 262.

³ *Jordan v. Savage*, 2 Eq. Ca. Ab. 102.

⁴ *Crisp v. Pratt*, Cro. Car. 540.

Lilly v. Osborn, 3 P. Wms. 298.

⁵ *Glaister v. Haver*, 8 Ves. 195
Tucker v. Cosh, Style, 289.; and
see *ante*, 365.

⁶ 8 Ves. 195.

which makes a material alteration in the law in this respect.¹ And it would seem also, from the preceding cases,² that where the purchase is made with the wife's money, she would have an equity to some sort of a provision.

Where, by a deed of separation, the bankrupt had covenanted with a trustee for his wife, (in consideration of being indemnified from all debts and engagements, that might be contracted by her during the separation) to release his remainder in fee in certain estates (of which he was tenant for life) to certain uses for the benefit of the wife; it was held, that such a covenant, being made with a third party, was binding in equity, and that it might be supported against creditors, by the consideration of indemnity against the wife's debts and engagements.³

2. As to the Personal Estate of the Wife.

A *chose in action*, to which the wife was entitled before marriage, passes to the assignees by the assignment, as well as all debts due to her *dum sola*;⁴ and also stock in the public funds, which she was possessed of at the time of her marriage.⁵ So, where the wife was a mortgagee in fee before marriage, the assignees will be entitled to the mortgage, for the right to the debt is vested in the assignees; and though the legal estate of the inheritance of the lands in mortgage continues in the wife, yet this is no more than a trust for the assignees, — in the same manner as where a mortgagee in fee dies, the mortgage money belongs to the executor, though the heir takes the legal estate by descent, but with no other title than that of a trustee for the executor.⁶ So also where an annuity is bequeathed to the wife, without one condition attached to it in the will, it passes to the assignees.⁷

It has been holden in some cases, that though the bankrupt die, before a *chose in action* (due to the wife *dum sola*) is reduced into possession, either by himself, or the assignees, — yet that the bankruptcy of the husband, and the assignment to the assignees, would amount to such a virtual reducing into possession, as would be sufficient to bar the

¹ See ante, 365.

² Ante, 373.

³ *Worral v. Jacobs*, 3 Meriv. 256.

⁴ *Miles v. Williams*, 1 P. Wms. 458.

249.

⁵ *Pringle v. Hodgson*, 3 Ves. 617.

⁶ *Bosvil v. Brander*, 1 P. Wms.

458.

⁷ *Count v. Ward*, 7 Bing. 608.

wife's contingency of survivorship.¹ But, in subsequent cases, the contrary opinion has prevailed; in one of which Sir W. Grant in an able judgment decided, that the wife was entitled by right of survivorship to a *chose in action*, under these circumstances, against the claims of the assignees.² And in a more recent case, where the wife had a reversionary interest in stock, and the husband took the benefit of the insolvent act; after which the person, on whose death the wife was to take, died, and then the husband died, without having done any act, either by himself or his assignees, to reduce the stock into possession; it was held, that the stock survived to the wife.³

Property bequeathed to her.] If a sum of money be bequeathed by a testator, in trust for the wife of a bankrupt, to be laid out and invested in a purchase for her "*sole and separate use*," and to be settled after her death upon her children, or in default of her appointment to go to her executors,—it does not go to the assignees, for it is not, in such a case, liable to the creditors of the husband.⁴ And where stock is so left to her for her separate use, an injunction will be granted to restrain the transfer of it.⁵ So if a legacy be left to the wife, directing "*the receipt to be a sufficient discharge*" to the executors, that is equivalent with saying to her sole and separate use.⁶ So also a bequest, "*whenever she shall demand or require the same*;" or, "in trust to pay the annual produce into *her proper hands*;"⁷ or a legacy "to be vested in trustees, the income to be for *her sole use and benefit*;"⁸ or a limitation in a settlement "for her *own sole use*, benefit, and disposition;"¹⁰—have all been holden to give an estate to the wife, which does not pass to the assignees.

But a *clear intention* of the testator must appear in the language of the will, that the bequest is for her *separate use*, in order to prevent the husband's right from attaching; for a mere bequest to a married woman, "to and for her *own*

¹ 1 P. Wms. 458. *Pringle v. Hodgson*, supra.

² *Mitford v. Mitford*, 9 Ves. 87.

³ *Hornsby v. Lee*, 2 Mad. 16. As to what acts of the husband amount to a reduction into possession of a wife's *chose in action*, see *Wildman v. Wildman*, 9 Ves. 174. *Nash v. Nash*, 2 Mad. 133. *Forbes v. Phipps*, 1 Eden, 502. *Milner v. Milner*, 2 T. R. 627. *Honner v. Morton*, 3 Russ. 65. *Purdew v.*

Jackson, 1 Russ. 1. *Hutchings v. Smith*, 9 Sim. 43.

⁴ *Vandenanker v. Deadbrough*, 2 Vern. 96. Per Lord Hardwicke, 3 Atk. 709. *Bennet v. Davis*, 2 P. Wms. 316.

⁵ *Stead v. Clay*, 1 Sim. 294.

⁶ *Lee v. Prieaux*, 3 Bro. 381.

⁷ *Dixon v. Olmuis*, 2 Cox, 414.

⁸ *Hartley v. Hurle*, 5 Ves. 545.

⁹ *Adamson v. Armitage*, G. Coop. 283.

¹⁰ Ex parte *Ray*, 1 Mad. 199.

use and benefit," has been held not to amount to a *separate* gift to her;¹ and a mere trust also to "*pay the interest to her for life*" has been determined not to be sufficient,² notwithstanding the property is bequeathed to the husband jointly with another trustee "*in trust for the wife.*"³ Whether the gift of a peculiar fund to the *husband alone, in trust* for the wife, would be intended as a gift to her separate use, and a court of equity would prevent him from exercising his marital power, in prejudice of the trust,—was a question propounded in the last case by the vice-chancellor, but not determined. And, where there was a bequest of the *interest* of personal property between the wife and her brother, and at her death one-half of the principal to go to her children, and her *husband by no means to have any part*,—even, in this case, the *life interest* was holden not to be to her separate use, on the ground, that the excluding words in the bequest referred only to the last antecedent, viz. the *principal*.⁴ But wherever the assignees may be entitled in right of the bankrupt to the property thus left to the wife, they will be compelled, in every case, to make a provision for her, before they can avail themselves of this interest taken by the bankrupt.⁵ The share apportioned to the wife, in these cases, is generally one-half of the legacy; which, if she has children, will be ordered to be settled on her for life, with remainder to the issue of the marriage.⁶

Where the wife had an interest in a legacy, and the assignees filed a bill to compel payment, and the bankrupt died before any decree was made, it was held that the widow and not the assignees was entitled to the legacy.⁷ But if personal estate is left to a woman, subject to a life interest, and she marry a trader who becomes bankrupt, and the tenant for life and the wife die after the bankruptcy, the assignees are in that case entitled to the legacy.⁸

And where by the bankrupt's ante-nuptial settlement certain property of his intended wife was assigned to trustees, upon trust for her sole and separate use during their joint lives, and afterwards for the survivor during his or her life, with remainder to the children, and the bankrupt covenanted

¹ *Wills v. Sayers*, 4 Mad. 409.
Roberts v. Spicer, 5 Mad. 491. *Tyler v. Lake*, 2 Russ. & Myl. 183. *Kensington v. Dolland*, 2 Myl. & K. 184. *Beales v. Spencer*, 2 Y. & C., Ch. Ca. 651.

² *Lumb v. Milnes*, 5 Ves. 517.

³ *Ex parte Beilby*, 1 G. & J. 167.

⁴ *Brown v. Clark*, 3 Ves. 166.

⁵ *Ibid.*; and see ante, 372.

⁶ 3 Ves. 166; and *Ex parte O'Farrell*, 1 G. & J. 347, see *Napier v. Napier*, 1 Dra. & War. 410. *Brett v. Greenwell*, 3 Y. & C. 230.

⁷ *Pearce v. Thornley*, 2 Sim.

⁸ *Ripley v. Woods*, 2 Sim. 165.

with the trustees, that he would pay to them 6000*l.* to be invested upon the same trust, and assigned to them a reversionary interest in stock, as a security for the payment of this sum; and default being made by him before his bankruptcy, the trustees sold his reversionary interest which realized 3900*l.*, leaving 2100*l.* of the fund unpaid; it was held, upon the petition of the surviving trustee and the *cestui que trusts*, that the bankrupt's contingent reversionary interest in the several trust funds should be sold to make good the balance so remaining unpaid, and that the trustee might prove for the residue.¹

A divorce obtained by the wife after her husband's bankruptcy, does not entitle her in equity to the whole of a fund previously bequeathed to her, but which does not come into possession until after the bankruptcy,—although no settlement may have been made upon her at her marriage, and her husband then received a sum of money as a portion with her. But the court in such a case will refer it to the master, to approve of a proper settlement upon the wife, and direct him to have regard to the extent of the fortune received by the husband in her right.²

The property of a *feme covert* sole trader, according to the custom of the city of London, does not pass to the assignees³ of the husband. And where a woman, before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business *separately*, and the husband did not intermeddle with them; it was held, that such effects, though fluctuating, were not assignable by the commissioners; for that the husband had not, in such a case, the order and disposition of the property with the consent of the true owner; the trustees being the legal owners, and they having given no consent for that purpose; and the wife's possession under these circumstances was held to be no evidence of fraud, for she was considered but the agent of the trustees.⁴

But where goods, the property of a widow and her children, were upon her second marriage assigned to trustees, in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees (for the use of the children) 800*l.*, by yearly instalments of 100*l.*, from July 1789, and he continued in possession of them till 1797, having paid only 250*l.*; and the day before his bankruptcy, the trustees

¹ *Ex parte Gonne*, 2 Dea. 278.

⁴ *Jarman v. Woolloton*, 3 T. R.

² *Green v. Otte*, 1 Sim. & S. 250.

618; and see *Haselinton, v. Gill*,

³ *Lavie v. Phillips*, 3 Burr. 1776.

ibid. 620, note (a).

repossessed themselves of the goods;—the court held, that this was fraudulent against creditors, and that the assignees were entitled to the goods.¹

Where the bankrupt is, under a marriage settlement, entitled to receive the dividends of stock for his life, the assignees in this case become entitled to them during the life of the bankrupt; and where the trustees under the settlement received the dividends after the bankruptcy, some of which they paid over to the wife of the bankrupt, it was held that the assignees might recover the total amount of such dividends from the trustees.²

A bankrupt, *before* his marriage, agreed by *parol* to settle *all* his stock on his intended wife—which stock (it appeared afterwards) amounted then to 450*l.*, 3 per cents., but in the articles executed in pursuance of such agreement before the marriage, and in the settlement executed afterwards, the stock was stated to be only 340*l.* in amount. This was clearly proved to have been a mistake, occasioned by the bankrupt having stated that amount as the *value* of the stock, and the subscribing witness having inserted it as the gross amount of the stock itself. After the act of bankruptcy, the mistake was rectified, by altering the sum in the articles and settlement; and those instruments were then re-executed by the bankrupt and his wife, and the trustees. *BEFORE* the bankruptcy the whole stock was sold out by the bankrupt, and the amount paid to the trustees. Under these circumstances, it was held by the court of King's Bench, that, however such an alteration might avoid the instruments—if done with the consent of all the parties interested—yet, inasmuch as one of the parties (the *feme covert*) was incapable of giving such consent, and as equity would probably set up again the destroyed instruments in her favour, the trustees (who had received the money when the instruments existed in a valid form) were entitled to hold the value of the 340*l.* stock, subject to the purposes of the trust, and not for the benefit of the bankrupt's estate; but that the surplus beyond that amount, at law, belonged to the assignees,—by reason that the *agreement* before marriage for the settlement of the *whole stock* was not *evinced by writing* pursuant to the statute of frauds,³ and was, under the circumstances, the subject only of equitable jurisdiction.⁴

¹ *Darby v. Smith*, 8 T. R. 82.

² *Allen v. Impett*, 8 Taunt. 263.

³ 29 Car. 2, c. 3, s. 4.

⁴ *Shaw v. Jakeman*, 4 East, 201.

PART II.

OF THE PERSONAL PROPERTY OF THE BANKRUPT.

- SECT. 1. *Of the Personal Property in general.*
2. *Of Debts, and Choses in Action.*
3. *Of Leases, and Annuities, and herein of Forfeitures upon Alienation.*
4. *Of Property ABROAD.*
5. *Of Property in the Possession, Order, or Disposition of the Bankrupt as REPUTED OWNER.*
 1. *What THINGS are within the Statute.*
 2. *What POSSESSION is within the Statute.*
 3. *Possession as Factor, Banker, or Broker.*
 4. *Possession as Trustee, Executor, or Administrator.*
6. *Of Property fraudulently delivered in contemplation of Bankruptcy.*
7. *Of Goods in transitu, and herein of the Right of Stoppage.*
8. *Of Goods sent, but not accepted; and of Goods ordered, but not delivered.*
9. *Of Goods subject to a LIEN.*
10. *Of the Claims of the Crown.*

(See also post, "*Relation*," "*Actions*." And as to the operation of bankruptcy upon the joint property of a *partnership*, under a separate fiat against one or more of the partners, see post, title "*Partners*.")

SECTION I.

Of the Personal Property in general.

By the 6 Geo. 4, c. 16, s. 63, the commissioners might assign to the assignees, for the benefit of the creditors of the bankrupt, all the *present* and *future* personal estate of

the bankrupt, wheresoever the same might be found or known, and all property which he might purchase, or which might revert, descend, be devised, or bequeathed, or come to him, before he should have obtained his certificate.

And by the 1 & 2 Will. 4, c. 56, s. 25, all the personal estate and effects, present and future, of any bankrupt, are declared to become absolutely vested in and transferred to the assignees, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed. And where any assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, is also declared, by virtue of such appointment, to vest in the new assignee, either alone, or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose.

All property, therefore, of every description, which accrues to the bankrupt *before he obtains his certificate*, passes to the assignees; so that, even in a case where a lottery ticket was given to the bankrupt by a creditor, who had signed his certificate, as a mark of approbation of his conduct, and the ticket happened to be drawn a prize before the actual allowance of the certificate, the proceeds were claimed and shared by the creditors.¹

All property, too, which other persons stand possessed of *in trust* for the bankrupt, passes to the assignees,—as a bond to pay a sum of money to the obligee, *in trust* for the bankrupt.²

Stock.] By 6 Geo. 4, c. 16, s. 80, if the bankrupt shall have any government *stock, funds, or annuities*, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, the commissioners may, by writing under their hands, order the same to be transferred into the name of the assignees, and all dividends to be paid to them. This clause is an extension of the provision made in this respect by the 36 Geo. 3, c. 90, by which *government stock* was made transferable to the assignees, *upon petition* to the lord chancellor; but as the transfer may be made now by the order of the *commissioners*, the expense of applying by petition will be saved.

Where stock was given upon trust for A. for life, and

¹ Per Lord K.; 7 T. R. 296; ² *Gerard v. Aylmer*, Palm. 505. and see post, 386.

after his decease for his children, with a proviso that A.'s life interest should not be subject to any alienation or disposition by mortgage, or otherwise, in any manner whatever; and in case he should charge, or affect to charge or incumber the same, such charge should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled; it was held, that, on A.'s bankruptcy, his life interest in the stock passed to his assignees.¹

Certain stock standing in the name of a bankrupt, the dividends of which had not been claimed, was (under the 56 Geo. 3, c. 60,) transferred to the commissioners for the reduction of the national debt. The assignees of the bankrupt, by petition under the act, claimed the stock as part of the bankrupt's effects; and it was also claimed by another person, who insisted that the bankrupt was merely a trustee for him. Under these circumstances, a reference was directed to the master to ascertain whose stock it was; and in the mean time the stock was directed to be transferred into the name of the accountant-general.²

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the court of Exchequer, on a bill filed by the assignees against the bank of England, ordered the bank to erase from their books the fictitious name, and insert that of the bankrupt.³

The assignees are not entitled to detain from the bankrupt any part of his *wearing apparel*, on the ground of its being *unnecessary*; for the bankrupt himself is to determine whether it is necessary or not, as he does so at the risk of an indictment for felony.⁴

By 6 Geo. 4, c. 16, s. 120, any person wilfully concealing any real or personal estate of the bankrupt, who shall not within forty-two days after the issuing of the fiat discover it to the commissioner or assignees, is liable to a penalty of 100*l.* and double the value of the estate so concealed; and any person who shall, after the time allowed to the bankrupt to surrender, virtually discover to the commissioner or assignees any part of the bankrupt's estate not before come to the knowledge of the assignees, is entitled to an allowance of 5*l.* per cent., and such further reward as the major part in value of the creditors present at any meeting called for that

¹ *Lear v. Leggett*, 1 Russ. & M. 690.

² *Ex parte Gillet*. *Ex parte Bacon*, 3 Mad. 28.

³ *Green v. Bank of England*, 3 Younge & C. 722.

⁴ *Ex parte Ross*, 1 Rose, 33. 17 Ves. 374.

purpose shall direct. Under this section, only one penalty can be recovered against the same party, notwithstanding there are different acts of concealment.¹ There may be some question, however, whether the enactment was intended to apply to a case of debtor and creditor; that is, whether a creditor, obtaining a fraudulent preference, is liable to the penalty.¹

SECTION II.

Of Debts and Choses in Action.

By the 63rd section of 6 Geo. 4, c. 16, all *debts* due, or to be due, to the bankrupt, wheresoever the same may be found or known, vest in the assignees as fully as if the assurance (whereby any of the debts are secured) had been made to the assignees themselves. And after the appointment of assignees, neither the bankrupt, nor any other person claiming through or under him, can recover any of such debts, nor make any release or discharge of them; neither can any of them be attached (as the debt of the bankrupt) according to the custom of the city of London, or otherwise. And the assignees are declared to have the like remedy to recover such debts in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt.

Where B. requested one of his creditors to pay to C. the balance that might be due to him, and the debtor expressed his assent to pay C. when the amount of the balance was ascertained, and after the ascertainment of the balance, but before the payment to C., B. became bankrupt, it was held that the debtor was justified in paying the balance to C., and that B.'s assignees were not entitled to it.²

A bond given to pay a sum of money to the obligee, *in trust* for the bankrupt, also passes to the assignees³ as well as a heriot or relief which happen to be due to him.⁴

Legacies.] So, a *legacy*, given to the bankrupt before the allowance of his certificate, has been held to pass to the assignees;⁵ and this, notwithstanding the allowance is

¹ *Brooks v. Glencross*, 2 Mood. & R. 62.

² *Gerard v. Aylmer*, Palm. 505.

³ 3 Com. Dig. Bankrupt, (D.

⁴ *Crowfoot v. Gurney*, 9 Bing. 372.

16.)
⁵ *Tudway v. Bourne*, 2 Burr. 716.

delayed by an unfounded petition to stay it,—unless indeed the petition was presented with that express object.¹ But where a testatrix had bequeathed by her will a share of the residue of her property in trust for her nephew for life, and by a subsequent codicil, after reciting that her nephew had become bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, for the maintenance and support of her nephew, and for no other purpose whatever, as they in their discretion should think most expedient; it was held that the assignees were not entitled to any portion of the provision made for him.² And where the bankrupt owed the testator a larger sum of money than the amount of the legacy, the assignees, in this case, were held not entitled to any part of the legacy, as against the executors.³

And where the testator had proved a debt of 42*l.* against the bankrupt's estate, and died before the bankrupt had obtained his certificate, having bequeathed him a legacy of 200*l.*; it was ordered that the amount of the legacy should be deducted from the proof.⁴

Where the father-in-law of the bankrupt gave by his will 4000*l.* in trust for his daughter for life to her separate use, then to the bankrupt for life, and then to the issue of the marriage; and, after reciting that the bankrupt was indebted to the testator in 6000*l.* in bond, the will declared that so much of the debt on the bond as remained unpaid in the trustee's lifetime, should go in redemption and satisfaction of the legacy of 4000*l.*; and prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1069*l.*, part of the bond debt, was paid off and invested in the funds, and the bankrupt's wife was dead; it was held, that, until the 4000*l.* should be made up, the 1069*l.* should accumulate, after which the assignees were declared entitled to the interest for the bankrupt's life.⁵

A bill of exchange deposited by the bankrupt with a third person, for the *specific purpose* of raising money on it, though such person advances some money on the bill, passes to the assignees; and they are entitled to recover it, after tendering to him the money he had so advanced,

¹ *Ex parte Ansell*, 19 Ves. 208.

⁴ *Ex parte Man*, Mont. & M.

² *Twopenny v. Payton*, 10 Sim. 210.

487.

⁵ *Ex parte Young*, 4 D. & C.

³ *Richards v. Richards*, 9 Pri. 645.
219.

though a general balance remained due to him from the bankrupt.¹

Rights of action.] All *rights of action* likewise pass to the assignees; as an action for unliquidated damages which accrued to the bankrupt before the bankruptcy by non-performance of a contract,² or where the contract has been broken since the bankruptcy by the refusal of the contracting party to fulfil the contract with the assignees.³

So, where a bankrupt before his bankruptcy lost his money at hazard, his assignees were held entitled to recover it back (under the 9 Ann. c. 14,) in an action against the winner.⁴ So, money paid by the bankrupt, on a corrupt and illegal agreement, may be recovered back by the assignees from the person to whom it is paid. But, where money was paid to a prosecutor, in consideration of putting off the trial of the bankrupt for perjury, for which he was not then prepared, this was held not recoverable by the assignees; though, if it had been paid by way of compounding the prosecution, it would have been otherwise.⁵

A right of action, however, does not pass to the assignees, *unless they interfere*; for the bankrupt may sue as trustee for them, and has a good title against all persons *but* the assignees.⁶ And no right of action passes to them for a mere *personal tort* to the bankrupt; such as *assault* or *defamation*. But, with respect to a tort to the *property* of the bankrupt, which has the effect of deteriorating its value, or diminishing the fund which would otherwise have been divisible amongst the creditors, in such a case the right of action passes to the assignees; as where the bankrupt's lessor neglected to pay the ground rent of the premises underlet to the bankrupt, by which means the bankrupt's property was distrained upon by the superior landlord.⁷ Upon the same principle, an injury to the bankrupt's property by running down a ship, or cutting timber, whereby a greater injury is sustained than the mere value of the timber fallen, would give the assignees a right of action for the damage sustained.⁸

¹ *Key v. Flint*, 8 Taunt. 21.
Buchanan v. Findlay, 9 B. & C. 788;
and see "Set-off."

² *Wright v. Fairfield*, 2 B. & Ad.
727. *Ferguson v. Spencer*, 1 Man.
& G. 987.

³ *Gibson v. Carruthers*, 8 Mees.
& W. 321.

⁴ *Brandon v. Pate*, 2 H. B. 308.

⁵ *Harvey v. Morgan*, 2 Star. 17.

⁶ *Cumming v. Roebuck*, 1 Holt.
472. *Clark v. Calvert*, 3 Moore,
96. 8 Taunt. 742.

⁷ *Vancoek v. Caffyn*, 8 Bing.
358.

⁸ See *Evans's B. L.* 14. 4 *Evans's*
Stats. 329.

So, even a right of action for a breach of contract relating to the employment of the personal skill and labour of the bankrupt, passes to the assignees as a contract to pay the bankrupt certain wages as the foreman in a type-foundry, and a dismissal of him without reasonable cause; for the damages sustained by such a breach of contract are considered as part of the bankrupt's personal estate, whereof a profit might be made.¹ But a right of action for a trespass in the bankrupt's dwelling-house, and making a noise and disturbance therein, whereby the bankrupt and his family were disturbed and annoyed in the peaceable possession of the dwelling-house, does not pass to the assignees;² nor a right of action for the seduction of a servant.³

By the 3 Geo. 4, c. 39, ss. 1 and 2, if, after the expiration of twenty-one days after the execution of any warrant of attorney, a commission of bankruptcy shall be issued against the party giving such warrant of attorney, then, unless the warrant of attorney, or a copy thereof, shall be filed with the clerk of the dockets in the court of King's Bench, together with an affidavit of the time of the execution thereof, within twenty-one days from the execution of it, or unless judgment shall have been signed, or execution issued on it, within the same period, such warrant of attorney, and the judgment and execution thereon, are declared to be fraudulent and void against the assignees, who may recover back for the use of the creditors of the bankrupt all the monies levied on effects seized under such judgment and execution. And by section 3, the like provision is made in respect to *cognovit actionem*. Under this statute it has been determined, that although a warrant of attorney be duly filed, yet if the affidavit made by the attesting witness do not specify *the day on which it was executed*, the affidavit is not in conformity with the directions of the statute, and therefore that the warrant of attorney and the judgment and execution thereon, are altogether void as against the assignees of the defendant, who may maintain trevor against the sheriff for goods seized by him under a *fi. fa.* issued upon such judgment and sold after the fiat.⁴

Money in hands of sheriff under an execution.] Where the bankrupt had recovered damages in an action on the case for

¹ *Drake v. Beckham*, 11 Mees. & W. reversing *Beckham v. Drake*, 8 Mees. & W 601.

² *Howard v. Crowther*, 8 Mees. & W. 601.

³ *Spencer v. Rogers*, 11 Mees. & W. 191.

⁴ *Dillon v. Edwards*, 2 Moore & P. 550.

words, and the sheriff had levied the amount under an execution against the defendant; but, instead of paying it over to the bankrupt, brought it into court; it was held, in one of the old cases, that the assignees were, under these circumstances, not entitled to the money, on the ground of its being *in custodia legis*, and therefore not assignable,—and that as it was levied by record, it could only be delivered to him who was able to acknowledge satisfaction of record, which the assignees (being strangers to the record) could not do; the money was therefore ordered to be delivered to the bankrupt.¹ But in another case, under similar circumstances, the court, though they refused to order the money to be paid over to the assignees, consented nevertheless to detain it, in order that the assignees might take out a *scire facias* against the defendant to try the bankruptcy.² And this, indeed, appears to be the more regular course of proceeding, whether the sheriff brings the money into court, or retains it in his hands;³ though in one case, where the bankrupt had obtained judgment on a *scire facias*, the court, upon motion, ordered the judgment to be entered, so as to entitle the assignees to the benefit of it, without bringing a new *sci. fa.*⁴ As several subsequent cases, however, have determined that a party, who is entitled to receive money levied by a sheriff, may bring an action against him for not paying it over, it seems that the assignees might (if the sheriff retained money in his hands which he had levied under the bankrupt's execution) recover it from him in an action for money had and received.⁵

Where a trader agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, and became bankrupt five years after the commencement of the partnership, when only one instalment was due; the court held, that his assignees were, nevertheless, entitled to the respective periods to receive the remaining instalments.⁶ So, where *compensation* was given by the legislature to the proprietors of ancient quays, upon the establishment of the West India docks, Lord Eldon decided, that this was an interest capable of disposition, and

¹ *Benson v. Flower*, Cro. Car. 166, 176. Sir W. Jones, 215.

² *Monk v. Morris*, Ventr. 193. 1 Mod. 93.

³ See post, "Actions," ch. 18, s. 3.

⁴ *Plummer v. Lea*, 5 Mod. 88.

⁵ *Speake v. Richards*, 2 Show. 289. *Dale v. Birch*, 3 Camp. 347.

Longdill v. Jones, 1 Star. 345. *Young v. Marshall*, 8 Bing. 43.

⁶ *Akhurst v. Jackson*, 1 Swanst. 85. 1 Wils. Ch. Rep. 47.

consequently passed to the assignees.¹ The subject-matter in this case was a specific vested pecuniary interest, and there could, therefore, be no doubt entertained that it was comprehended within the terms of the bankrupt acts.

Good-will.] But, with respect to what is called the *good-will* of a business—that is, a compensation given to a trader for declining trade and recommending another as his successor, he himself engaging not to carry on the same business within certain limits,—Sir W. Evans very justly observes, it is impossible to suppose that the assignees of a bankrupt can compel him to enter into similar stipulations for a consideration to be paid to themselves.² And his reasoning derives great weight from what was said by Lord Eldon in a case, where the assignees of a bankrupt (who was a carrier) had sold to a plaintiff the premises which the bankrupt had occupied, as well as the carrying business, in these terms: “*and also the good-will of a long established trade, &c.*” and, the bankrupt having resumed the like business in the same district, the lord chancellor refused to grant an injunction to prevent him from so doing,—observing, that the good-will, which was the subject of sale, was nothing more than the *probability* that the old customers would resort to the old place; and that by interposing in this particular instance, he should carry the effect of injunction to a much greater length than any decision had authorized, or imagination ever suggested.³

It has, however, been decided that the right of publishing a particular *newspaper* was a property affected by the bankrupt law;⁴ and Lord Mansfield is also reported to have held, that what is called a *news-valk*, that is, the business of selling newspapers to particular customers within a given beat, was likewise a property distributable under a commission of bankrupt.⁵ But the authority of this last case (as far as it implies any *obligation* on the bankrupt) is much shaken by the above decision of Lord Eldon in *Crutwell v. Lye*, as well as the forcible reasoning of Sir W. Evans,⁶ in his comment on the former statutes relating to bankrupts.

A *patent* right for the exclusive exercise of an invention,

¹ *Chandler v. Gardiner*, cit. 17 Ves. 338, 343.

² *Evans's B. L.* 20.

³ *Crutwell v. Lye*, 17 Ves. 335. 1 Rose, 123. *Farr v. Pearce*, 3 Mad. 74; *ex parte Thomas*, 2 M. D. & D. 294.

⁴ *Longman v. Tripp*, 2 N. R. 67; and see *Hogg v. Kirby*, 8 Ves. 125; and *Cooke v. Calcraft*, 3 Wils. 380, as to the general interest in such property.

⁵ 2 N. R. 70.

⁶ *Evans's Bankrupt Statutes*, page 19, note 10.

though obtained from the crown by the bankrupt after his bankruptcy, but before he procures his certificate, is affected by his bankruptcy, and also vests in the assignees.¹

So, a *policy of insurance*, effected by the bankrupt upon his own life at an annual premium, passes to his assignees; and where, instead of delivering it up as part of his effects, a bankrupt secretly assigned it to another person, who paid the arrears of the premium, and upon the death of the bankrupt received the sum insured; the amount, deducting the arrears so paid, was held to be recoverable by the assignees as money had and received to their use.² The retiring pension of a military officer of the East India company does not pass to his assignees,³ upon the same principle, as we have already seen,⁴ the pay of an officer in the army does not pass to them.

SECTION III.

Of Leases, and Annuities, and herein of Forfeiture upon Alienation.

A *lease* granted to a bankrupt passes to his assignees, although it contain a proviso that the lessee shall not assign without the lessor's consent; for the interest in the lease is considered to vest in the assignees by *operation of law*,⁵ and not by the *act of the party*, (that is, the voluntary assignment of the lessee) to which last mode of transfer a restriction of this nature is alone confined.⁶ And where a lessee, under a lease, containing a covenant not to assign, conveyed all his estates to trustees for the benefit of his creditors, it was held, that as this conveyance was void under the bankrupt law, it was not a forfeiture of the lease.⁷ But a lease, with a proviso that the landlord might *re-enter*, if the lessee should "commit an act of bankruptcy whereon a commission should issue, and he should be *found a bankrupt*," does not pass to the assignees;⁸ for this is a *condition* annexed to the demise itself, and renders the *term void*, in case the

¹ *Hesse v. Stevenson*, 3 B. & P. 565. *Bloxam v. Elsee*, 6 B. & C. 169.

² *Schondler v. Wace*, 1 Camp. 487.

³ *Gibson, v. E. I. Comp.*, 5 Bing. N. C. 262.

⁴ *Ante*, p. 359.

⁵ *Goring v. Warner*, 2 Eq. Ca. Ab. 100. 7 Vin. Ab. 85. *Philpot*

v. Hoare, Amb. 480. 2 Atk. 219. *Doe v. Bevan*, 3 M. & S. 353. *Doe v. Bugby*, 3 Wils. 234.

⁶ *Ex parte Baglehole*, 1 Rose, 432. *Ex parte Sherman*, Buck. 462.

⁷ *Doe v. Powell*, 5 B. & C. 308.

⁸ *Roe v. Galkiers*, 2 T. R. 133; and see 15 Ves. 268.

lessee becomes a bankrupt. The owner of property, indeed, cannot by contract, or otherwise, qualify *his own interest*, by a condition determining or controlling it in the event of his bankruptcy, to the prejudice of his creditors (as has been already fully considered in the case of marriage settlements); but a lessor, like any other grantor or alienor, may qualify the *interest of his lessee*, upon a condition to take effect on the bankruptcy either of the lessee,¹ or of his executors. But the acceptance of rent, after the bankruptcy, will be a waiver of the forfeiture.²

So, where the term is made to depend upon the *actual occupation* of the premises by the lessee, the assignees have, in this case, not such an interest as they can assign, if the bankrupt does not continue to occupy.³

Annuities.] In like manner where an *annuity* was given by will to a trader, "payable to *him only*, upon his own receipt and no other, and *to cease immediately upon alienation*,"—it was held, that it ceased upon his bankruptcy, and the bargain and sale of his estate.⁴ So, where there was a bequest to pay an annuity to A., with a proviso, that if by any ways or means whatsoever he should sell, dispose of, or *incumber* his life-interest, or any part thereof, his interest should then cease, and the trustees should apply and determine the same for the benefit of his children,—it was held, that upon his bankruptcy the annuity ceased to be the subject of his personal enjoyment, and did not, therefore, vest in his assignees; but that his children were entitled to it.⁵

But where a testator directed, that his estate and effects should be laid out in the public funds in the names of trustees, who were to "pay the dividends from time to time into his son's hands, or to his order, and on his receipt, to the intent that the same, or any part thereof, should not be grantable, or assignable, by way of anticipation,"—Lord Eldon held, that on the bankruptcy of the son, his assignees were entitled to his interest under the will.⁶ And in another case, where the testator bequeathed several annuities, and (amongst the rest) one to the bankrupt, and declared that "if any of the annuitants should assign, or dispose of, or otherwise charge

¹ *Wilson v. Greenwood*, 1 Swanst. 481; and see per Lord Ellenborough, 3 M. & S. 357. *Doe v. David*, 1 Cr. M. & R. 405, 5 Tyr. 125. *Doe v. Davis*, 6 C. & P. 614.

² *Doe v. Rees*, 4 Bing. N. C. 384.

³ *Doe v. Clarke*, 8 East. 185.

⁴ *Dommett v. Bedford*, 6 T. R. 684. 3 Ves. 149.

⁵ *Cooper v. Wyatt*, 5 Mad. 483.

⁶ *Brandon v. Robinson*, 1 Rose, 197.

or *incumber* his annuity, so as not to be entitled to the personal receipt, use, and enjoyment thereof, the annuity should thenceforth cease, determine, and be void, and should immediately devolve upon the person next entitled, by virtue of the limitations in the will, —Sir W. Grant, upon the principle of the above decisions as to *leases*, in which an assignment *by operation of law* is holden not to be an alienation of the party, considered that the interest had not ceased by the bankruptcy, but that it vested in the assignees;¹ though, in another case, where the annuitant had taken the benefit of the *insolvent act*, the same learned judge held, that a condition of this nature was broken by the annuitant, inasmuch as the *signing the petition and schedule* were clearly acts of alienation committed by the insolvent.²

The above decisions of *Brandon v. Robinson* and *Wilkinson v. Wilkinson* are, certainly, quite at variance with those of *Dommett v. Bedford* and *Cooper v. Wyatt*. The grounds of Lord Eldon's judgment in *Brandon v. Robinson* are, that there is a great difference between giving an interest to a person while he shall *remain solvent, and then over*, —and giving it *generally for life*; and, that it is not enough for a testator to say the fund shall not be transferred, but that in order to prevent that, it must be given *over to somebody else*, or made to fall into the residue of his property; otherwise, it becomes an equitable interest to which the assignees are entitled.³ This reasoning, however, will not apply to the case before Sir W. Grant, where the annuity *was* given over, being made to devolve upon the person next entitled under the will; and the limitation is also strong as to the *personal enjoyment* of the annuity by the annuitant. Whether a grantor, therefore, of an annuity can effectually limit his grant to the period only of the solvency, or personal enjoyment, of the annuitant, unaccompanied with any limitation over in case of insolvency, &c., so as to prevent it from passing to the assignees under a fiat in bankruptcy, is a question which may still admit of very considerable doubt. The following decisions, however—one relating to an annuity, and the other to a patent—accord with the decision of Lord Eldon and Sir W. Grant.

A testator gave an annuity to his son, and declared that it was intended “for his personal maintenance and support, and that it should not, on any account or pretence whatever, be subject or liable to the debts, engagements, charges, or

¹ *Wilkinson v. Wilkinson*, G. see *Holyland v. De Mendez*, 3 Coop. 259. Meriv. 184.

² *Shee v. Hale*, 13 Ves. 404; and ³ 1 Rose, 197.

incumbrances of my said son, but that the same should be paid over into his proper hands only, and not to any person or persons whatever, and that his receipts only should be good and sufficient discharges;" and it was held, on the son's bankruptcy, that the annuity passed to his assignees.¹

So, where an act, for enlarging the term of a patent, enacted, that in case the privilege granted by the patent should at any time become vested in, or intend for more than five persons, or their representatives, otherwise than by devise or succession, (reckoning executors as and for the single persons they represent,) then all liberties and privileges vested in the patentees should cease, and the patentees became bankrupt;—it was held, that though creditors exceeding five had proved under the commission, the clause applied only to an assignment by act of the party, and not to an assignment by operation of law, and that the interest of the assignees in the patent had not ceased.²

When a lease vests in the assignees.] A lease, or term of years to which the bankrupt was entitled, does not vest in the assignees, unless they do some act to manifest their acceptance of the lease;³ for they are not bound (as has been before observed⁴) to take *all* the property of the bankrupt, but may reject such as may be rather a burthen than a benefit to the estate. Before the case of *Copeland v. Stephens*, however, it was a point still undecided, whether the bankrupt's interest in a lease *passed immediately* to the assignees, *defeasible* upon their actual refusal to take it,—or, whether the interest in it was *suspended*, until their acceptance or rejection of it. In an able judgment pronounced by Lord Ellenborough in that case, it was determined, that the effect of the assignment was *suspended*, until the assignees decided either to accept, or reject, the lease; and that the estate *remained in the bankrupt during the period of such suspension*, but subject to the right of the assignees to have the term, by their subsequent acceptance of it, and thereby to vest it in themselves.⁵ And it has been since decided, that the subsequent rejection of the lease by the assignees does not operate by relation, as a surrender of it from the date of the fiat.⁶

What acts on the part of the assignees will amount to an acceptance of the lease, and what to a rejection, will be best explained by the following cases.

¹ *Graves v. Dolphin*, 1 Sim. 67.

⁴ Ante, 320.

² *Blaxam v. Elsee*, 6 B. & C.

⁵ 1 B. & A. 593.

169.

³ *Copeland v. Stephens*, 1 B. & A.

⁶ *Tuck v. Fyson*, 6 Bing. 320.

*93.

What amounts to acceptance.] A landlord applied to the assignee to know if he meant to take the bankrupt's interest in the lease, and he answered, that if he did not let it by Lady-day, he would give it up; and at Lady-day the assignee paid the rent then due, and offered the landlord the key; under these circumstances, Lord Kenyon held, that though the assignee might have refused it at first, yet he could not take it in part, and afterwards reject it, when he found that it would not answer and he could not let the premises.¹ So, where the assignees, who were chosen on the 8th July, allowed the bankrupt's cows to remain on the demised lands till the 10th, and ordered them to be milked there,—Lord Ellenborough decided, that they thereby became tenants to the lessor; and, the cows having been removed on the 10th to avoid a distress for arrears of rent, it was held, that the landlord had a right to follow and distrain them under the 11 Geo. 2, c. 19.² So, if assignees intermeddle with, and assume the management of a farm, this is a sufficient election to take to the term,³ and renders them liable to the landlord. So, also, where assignees entered upon, and took actual possession of the leasehold property, they were held to become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold; for, if they had wished to curtail the full legal effect of taking possession of the premises, they should have entered with a protest, that their entry was not for the purpose of possessing themselves of the premises as assignees, but merely to take possession of the goods.⁴ In like manner, where the assignees entered upon the premises of the bankrupt, who was a coachmaker, to keep the coaches in repair, in pursuance of the bankrupt's contracts, and in August the bankrupt's effects were sold, when the key of the premises was delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following; it was held, that the assignees were still liable to the landlord for the rent for the following Christmas quarter.⁵ And, when the assignees permitted the bankrupt to continue in possession of the premises, from the period of his bankruptcy in November until April, and to carry on the trade for the benefit of the estate, the assignees inspecting the books, and

¹ *Broome v. Robinson*, cit. 7 East, 339.

² *Welch v. Myers*, 4 Camp. 368.

³ *Thomas v. Pemberton*, 7 Taunt. 201.

⁴ *Hanson v. Stevenson*, 1 B. & A. 303.

⁵ *Ansell v. Robson*, 2 Cr. & J. 610.

furnishing the bankrupt with money,—it was held, that they could not afterwards disclaim to accept the lease, notwithstanding a notice to that effect had been given by them within a month after the bankruptcy.¹ So, where the bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sold “*all his estate and reversionary interest in the premises*,”—this was held to amount to an acceptance of the lease.² And so, where the assignees placed a board upon some part of the premises, with a view to dispose of them, they were holden liable in use and occupation for a year’s rent.³ Where assignees, also, upon being required to give up possession of premises, answered that it was not consistent with their duty so to do,—this was held sufficient proof of possession by them, in an action of ejectment brought against them for the recovery of the premises.⁴

But though the assignees, by accepting a lease, discharge the bankrupt from any claims for rent, and render themselves liable to the landlord, yet they may assign it, if they choose, to any person (even though an insolvent) in order to get rid of their liability.⁵

What is not an acceptance.] And the assignees are not bound to take a lease, merely because they endeavour to sell it, with a view to ascertain its value, provided they exercise no other acts of ownership over the premises demised. Thus, where assignees advertised a lease for sale by auction (without stating themselves to be the owners, or possessed of it), and never, in fact, took possession of the premises, and no bidder offered at the auction, it was held, that this was no more than an experiment to ascertain the value, and whether the lease was beneficial or not to the creditors, and did not amount to an assent to take it.⁶ But in a case where the lease was bought in, but all the fixtures were sold, and the premises were much injured by their being taken down and carried away, it was held that this was a taking of possession by the assignees, as they had no right to act so as to make the property of less value to the landlord.⁷ And if assignees accept the bidding at a sale, and receive a deposit, that will be evidence of their assent to take to the premises, notwith-

¹ *Clark v. Hume*, 1 Ryan & M. 207.

² *Page v. Godden*, 2 Star. 309.

³ *Gibson v. Courthorpe*, 1 D. & R. 205.

⁴ *Doe v. Taylor*, 2 Star. 535.

⁵ *Onslow v. Corrie*, 2 Mad. 330.

⁶ *Turner v. Richardson*, 7 East,

355.

⁷ *Carter v. Warne*, 4 C. & P. 193.

standing the contract of sale may afterwards go off.¹ In one case, however, where assignees allowed the bankrupt's effects to remain on the premises for nearly a twelvemonth after the bankruptcy, and then, to avoid a distress, paid the rent due, at the same time intimating to the landlord that they did not mean to take to the lease, unless it could be advantageously disposed of, and the lease was soon afterwards put up to sale by order of the assignees, but there was no bidder for it, and they even omitted to return the key to the landlord for near four months afterwards, but never took actual possession of the premises,—Lord Ellenborough held, that the assignees were not, under these circumstances, liable to the landlord as assignees of the lease.² In another case, also, where the assignees held the lease from December to May, and put a person into possession, with instructions to let the premises, but they remained unlet, and on the landlord's calling upon the assignees for payment of the rent, he said he would pay it if he could make any thing of the house; it was held that this was only a conditional acceptance of the lease.³ And where the bankrupt had underlet part of the demised premises, and the assignees released the under-tenant, and on being afterwards asked by the lessor to elect, they refused to take the lease,—it was held, that the release to the under-tenant did not amount to an acceptance.⁴

When assignees may be compelled to elect.] But now, in order to prevent any inconvenience to the landlord, from the neglect of the assignees to determine whether they will take to the lease or not, it is by the 75th section of the 6 Geo. 4, c. 16, provided, that if the assignees shall not (upon being thereto required) elect, whether they will accept or decline any lease, or agreement for a lease, to which the bankrupt was entitled, the lessor, or person so agreeing to grant a lease, or any person entitled under them, may apply by petition to the lord chancellor, who may order them so to elect, and to deliver up such lease or agreement, (in case they shall

¹ *Hastings v. Wilson*, 1 Holt, N. P. Rep. 290.

² *Wheeler v. Bramah*, 3 Camp. 340. And see *How v. Kennett*, 5 Nev. & M. 1.

³ *Lindsey v. Limbert*, 12 Moore, 209. This case, however, as well as the preceding one, of *Wheeler v.*

Bramah, and the subsequent one of *Hill v. Dobie*, are not very reconcilable with those of *Broome v. Robinson*, *Welch v. Myers*, and *Page v. Godden*, ante, pp. 394-5.

⁴ *Hill v. Dobie*, 2 Moore, 342. 8 Taunt. 325.

decline it,) as well as the possession of the premises, or may make such other order therein as he shall think fit.¹

This statute applies only to cases between the *lessor* and lessee, or the assignee of the lessee, and not to cases between the *lessee* and the assignee of the lease.² But it extends to a case where the bankrupt is only beneficially entitled to a moiety of the lease, or is a trustee for himself or another person;³ or where the lease is in the hands of a third person, as equitable mortgagee.⁴ The lord chancellor, however, could not under this section determine the question, whether the assignees *had elected* to take the lease or not, but could only send such a question to be tried by a jury;⁵ for he had only authority, under the above provision, to make an order that the assignees *should elect*. It is only, in fact, when assignees will *not decide*, that jurisdiction was given to the lord chancellor; for if they had already accepted, or rejected, he had no jurisdiction.⁶ Therefore, where assignees had *previously rejected* a lease, a petition by the lessor for payment of rent due after the bankruptcy, and for a compensation for hay and straw which the assignees had carried off the premises, was dismissed;⁷ Lord Eldon concurring with the vice-chancellor, that, as between the lessor and the assignees of a bankrupt lessee, the court had not jurisdiction, except in cases *under the statute*, and upon petitions for an *injunction*; for which last relief the petition in this case contained no prayer.

Upon a petition for an order on the assignees to elect, they will be allowed a reasonable time,—such as ten or thirteen days, for instance,—to consider what will be most beneficial for the creditors.⁸ And in a case where there were two commissions, and issues directed which were still undecided,—the court granted an order (under each commission) on the assignees, to make an election to depend on the result.⁹

Where an order to elect is served on an assignee, and he takes no notice of it, the court will, on a fresh petition, order the lease or agreement, to be rescinded, and the possession of the premises to be delivered up to the landlord.¹⁰ And where, after an order had been made that the assignees should

¹ This clause is taken from the 49 G. 3, c. 121, s. 19.

² *Taylor v. Young*, 3 B. & A. 521.

³ *Ex parte Norton*, 3 M. D. & D. 312.

⁴ *Ex parte Vardy*, 3 M. D. & D. 340.

⁵ *Ex parte Quantock*, Buck, 189.

⁶ 1 Mad. 77.

⁷ *Ex parte Warrick*, Buck, 326.

⁸ *Ex parte Scott*, 1 Rose, 446.

note a. *Ex parte Fletcher*, 1 D. & C. 356.

⁹ *Ex parte Pomeroy*, 1 Rose, 57.

¹⁰ *Ex parte Blandy*, 1 Dea. 286.

deliver up the possession of the premises to the lessor, he claimed to prove for the use and occupation of the premises by the bankrupt up to the time of his bankruptcy, for the amount of the dilapidations, and for ground rent paid by the lessor during the bankrupt's occupation; it was held, that the previous order did not exhaust the jurisdiction of the court given by the 75th section, and that the court had authority to make such further order as the justice and equity of the case required; and it accordingly directed an inquiry as to what sums the lessor was entitled to receive from the bankrupt, in respect of the above claim, with a view to proof being made for the amount.¹

If the assignees elect to reject the lease, and there is some reason to suspect that the lease is void, and that the landlord had no title to grant it, the court will not order the assignees to deliver up possession of the premises, but merely to deliver up the lease.²

It has been held in one case, that on a petition for the assignees to elect, the court has no power to compel them to pay the costs, or to give the lessor the costs of the application out of the bankrupt's estate;³ but the contrary has been since decided.⁴

Where the assignees declined taking the lease, but insisted that they were entitled to remove from the premises all the hay, straw, &c. (which, by a covenant in the lease, the lessee at the end, or sooner determination of the term, was to leave upon the premises),—Lord Eldon determined the lease, and directed a case upon the construction of the covenant.⁵ Upon the argument of this case before the court of King's Bench, it was decided, that the assignees were bound by the covenant of the lessee, and were not entitled to the hay, straw, &c.⁶ In all these cases, indeed, where the court determines the lease upon the petition of the lessor, the assignees are in the same situation as the tenant would have been in by effluxion of time. Therefore, where a lease contained a covenant, that the lessee, "at the expiration, or other sooner determination of the lease," might take the off-going crop, and the lease was determined by the chancellor after the bankruptcy of the lessee,—the assignees were held to be

¹ Ex parte *Benecke*, 2 Dea. 46.

² Ex parte *Williams*, 2 Dea. 330.

³ Ex parte *Bright*, 2 G. & J. 79.

⁴ Ex parte *Norton*, 3 M. D. & D. 312.

⁵ Ex parte *Nixon*, 1 Rose, 445. This case at first sight appears to

clash with the decision in ex parte *Warwick*, supra; but the distinction between them is, that in this case there was a prayer for an injunction; in that case there was no such prayer.

⁶ In re *Gough*, Buck, 85.

entitled¹ to the off-going crops. Nor does it make any difference, that the lease is only from year to year, *determinable on giving half a year's notice*, and the covenant is to leave the hay, &c., or take the crops, on quitting the premises;² for the election of the assignees, not to take the lease, has the same effect (with reference to the covenant), as though the lessee had quitted upon notice.³ But when assignees decline the lease, and it is delivered up by the bankrupt to the lessor, they cannot afterwards maintain an action of covenant against the lessor;⁴ nor have they a lien on the premises for money expended by the bankrupt, in pursuance of an agreement between him and the landlord, which contemplated a continuance of the tenancy; as where certain buildings were erected by the bankrupt, on the agreement of the landlord that the expense might be deducted from the rent.⁵

Where a lease contained a condition that it should be forfeited, if seized in execution, and, upon an execution issuing, the lessor re-entered, and a commission of bankruptcy then issued against the lessee, it was held that the lessor was entitled to the emblements.⁶

An agreement to grant a lease is not annulled by the bankruptcy of the intended lessee, but the assignees can enforce the agreement against the intended lessor.⁶

Parol agreement for a lease.] It was held by Lord Eldon, that a *parol* agreement for a lease, (although brought within the principle, upon which a court of equity would decree a specific performance, upon acts of part performance) was not an agreement within the meaning of the statute, so as to put assignees to elect, or reject, such agreement.⁷ But the contrary has been since decided.⁸ And a covenant to procure a lease to be granted by a third person, is also an "agreement for a lease" within the above section, and the covenantor is entitled to call on the assignees to elect whether they will accept or decline such agreement.⁹ But the statute does not extend to a contract not in its nature a lease, but amounting only to a purchase of property.¹⁰

¹ Ex parte Maundrell, Buck, 83.

² Ex parte Whittington, Buck, 87.

³ Kearsey v. Carstairs, 2 B. & Ad. 716.

⁴ Ex parte Ladd, 3 D. & C. 647.

⁵ Davis v. Eytton, 7. Bing. 154.
4 Moore & P. 820.

⁶ Morgan v. Rhodes, 1 M. & A. 214. Crosby v. Tooke, Ibid. note.

⁷ Ex parte Sutton, 2 Rose, 148.

⁸ Slack v. Sharpe, 8 Ad. & E. 366. Ex parte Hopton, 2 M. D. & D. 347.

⁹ Ex parte Benecke, 1 Dea. 186.

¹⁰ Hope v. Booth, 1 B. & Ad. 498.

Where the lease had been deposited by the bankrupt with a *third person*, as a security for a debt, and the assignees refused to take to the term,—upon a petition by the landlord that the assignees might deliver it up, as well as the possession of the premises, an order to that effect was made. For though the statute does not in words extend to cases, where the lease is in the hands of a *third person*, yet it seems that, by an equitable construction of the above section of the act, which is intended for the benefit of landlords, the court has such a jurisdiction.¹

SECTION IV.

Of Property Abroad.

As the 6 Geo. 4, c. 16, s. 63, enabled the commissioners to assign the bankrupt's property, *wheresoever the same might be found or known*,² the assignees are entitled to all the personal property, which the bankrupt may possess in any *foreign country*, unless there happens to be some positive law of that country to prevent it. For *personal property*, according to the general principles of all laws, has no visible locality, but is subject to that particular law, which governs the *person* of the owner.³ If the bankrupt law, indeed, was circumscribed by the local situation of the property, a door would be open to all the partiality of undue preference, which it is framed chiefly to prevent; for it is not very difficult to foresee how frequently property would be sent abroad with that unjust view, immediately previous to and in contemplation of an act of bankruptcy. But the consequence of the rule, as it at present applies to personal property, is, that a fiat in bankruptcy followed by the appointment of assignees, defeats all preference attempted to be obtained by any one creditor, through the medium of the law of the country where any of the bankrupt's effects may happen to be placed—as well as by any voluntary conveyance of the bankrupt—after the period, when the legal effect of the bankruptcy attaches to the general estate.

Thus, the bankrupt's goods in Ireland will pass to the assignees under an English bankruptcy, and the Irish courts will also take notice of our laws, so as to prevent a creditor from attaching property there after the fiat, and gaining a

¹ *Ex parte Clunes*, 1 Mad. 76.² *Sill v. Worswick*, 1 H. B. 665.³ Section 63, ante, page 383.

preference¹ over the assignees. So, the courts in Scotland, and the colonies, recognise the English law in this respect. For, where bankrupts here had carried on business both in London and in Scotland, under distinct firms, the court of session in Scotland held, that the commission here vested in the assignees all the property of the bankrupts wherever situate,—precluding creditors in Scotland from attaching by sequestration such parts of the bankrupts' property as remained, or was situate, in that country.² Whether a commission in England, or a sequestration in Scotland, is to be preferred, as the mode of administering the effects of a bankrupt, depends upon their respective priorities.³

Where, *after the assignment* of a bankrupt's estate, a creditor residing in England, who had notice of the bankruptcy and assignment, attached the money of the bankrupt abroad,—it was held, that his assignees might recover it against the creditor in an action for money had and received.⁴ And in another case, where the attachment was *before* the assignment, the same doctrine was held.⁵ In one case indeed of this kind, Lord Hardwicke even granted a writ of *ne exeat regno* against a creditor, who before the bankruptcy had gone into Scotland, and made arrestments on debts due to the bankrupt there, though he had not obtained sentence—saying that the case was like a foreign attachment, by which a creditor was not suffered to gain a priority.⁶

But in a case, where the bankrupt was one of several partners, his partners carrying on a branch of the business in the West Indies, and a joint creditor there attached property belonging to the firm abroad,—it was held by Sir W. Grant, that he was entitled to retain what he had recovered, to the extent of satisfying his joint debt.⁷ So, where a foreign creditor, after proving the amount of his

¹ Good, 114. *Neale v. Cottingham*, 1 H. B. 132, in note.

² *Bank of Scotland v. Cuthbert*, 1 Rose, 462; and see *Selkrig v. Davis*, 2 Dow. Rep. 230. 2 Rose, 291, and *Oduin v. Forbes*, Buck, 57.

³ *Ibid.*

⁴ *Hunter v. Potts*, 4 T. R. 182. *Philips v. Hunter*, 2 H. B. 402. The law upon this subject, however, appears to have been formerly laid down differently by Lord Mansfield, both at *Nisi Prius*, and at the Cockpit. *Waring v. Knight*, 1 C. B. L.

300. *Cleve v. Mills*, *ibid.* 297. See also a powerful judgment of Eyre, C. J. on that side of the question, in *Philips v. Hunter*, 2 H. B. 409.

⁵ *Still v. Worswick*, 1 H. B. 665.

⁶ *M'Intosh v. Ogilvie*, 4 T. R. 187, note (a).

⁷ *Brickwood v. Miller*, 3 Meriv. 279. Sir W. Grant expressed a doubt in this case, whether the reasoning of Lord C. J. Eyre, in *Philips v. Hunter*, has ever received a completely satisfactory answer.

debt by his agent at Calcutta, against the estate of P. & Co., who had been declared insolvent under the India Insolvent Act, (9 Geo. 4, c. 73,) and, after receiving dividends upon his whole debt, instituted a suit in the Dutch courts in the island of Java, to recover an estate which was held by one of the insolvents as a trustee for his own firm of P. & Co., and that of C. & Co., in equal shares, to which suit the assignees appeared as defendants; but judgment was given in favour of the creditor, and for the sale of the estate for his benefit, the proceeds of which amounted to three-fifths of his whole debt; and the assignees filed a bill on the equity side of the supreme court at Calcutta against the creditor's agent there, praying that the dividends might be refunded, and that the defendant might be restrained by injunction from receiving any further dividends, until all the other creditors were put upon an equal footing with the creditors at Java; and judgment was given against the assignees;—it was held, on appeal to the court of privy council, that the estate in Java did not pass to the assignees under the assignment, or form any part of the fund that was available for the benefit of the general creditors; and that the creditor, therefore, was not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20s. in the pound upon his whole debt.¹ And where the attachment of property in a foreign country is *complete before the act of bankruptcy*, the creditor is then, of course, entitled to hold the property attached against the assignees, in satisfaction or reduction of his debt.² Whenever, also, property has been duly recovered by a creditor from the bankrupt's debtor, by process of local law, the assignees are not entitled to claim the value of it again, as against such debtor.³

A., a merchant at Paris, purchased in his own name, but with the money on account of B. (a merchant at Bristol), certain bank shares in the French funds; and B. afterwards drew bills on A., which A. accepted, on the security of those shares standing in his name; three of which bills were purchased by C. (a British subject) for a valuable consideration paid to B. Before the bills became due, B. authorised A. by letter to sell the bank shares, in order to reimburse himself against these bills; but previous to the arrival of that letter, A. had stopped payment, and the bills were

¹ *Cockerell v. Dickens*, 1 M. D. & D. 45.

² *Le Chevalier v. Lynch*, Doug. 170.

³ *Ex parte D'Oires*. *Ex parte Le Mesurier*, 8 Ves. 82.

dishonoured. B., also, afterwards became bankrupt; and C. then, by process according to the French law, attached the bank shares (still standing in the name of A.) for the debt due to him as the holder of the bills; and the French court decreed, that the bank shares should be sold, and that the proceeds should be applied, first to pay a debt due from B. to A., and afterwards to retire the bills; and C., under this decree, received a certain sum of money on account of the bills. Under these circumstances it was held, that the assignees of B. could not recover back this money, as money belonging to B.; for that A. had more than a simple lien on the bank shares, they being in law *his property*, and vested in him, though in trust for B., after satisfying his own lien.¹

Upon the same principle, as the courts here refuse to acknowledge the validity of an attachment made by a creditor on the bankrupt's property abroad, which may give him an undue preference over the other creditors,—so the English courts will equally give effect to the claim of foreign assignees (when the laws of the foreign country are proved), in the recovery of personal property here;—and will prevent a creditor from obtaining an exclusive satisfaction out of such property, to the prejudice of the foreign assignees.²

SECTION V.

Of Property in Possession, Order, or Disposition of the Bankrupt, as reputed Owner.

1. *What things are within the Statute.*
2. *What Possession is within the Statute.*
3. *Possession as Factor, Banker, or Broker.*
4. *Possession as Trustee, Executor, or Administrator.*

(*For reputed ownership in cases of dissolution of partnership, see post, "Partners."*)

By section 72 of the 6 Geo. 4, c. 16, it is enacted,³ that if any bankrupt at the time he becomes bankrupt shall, by

¹ *Cazenove v. Prevost*, 5 B. & A. 70. *Jallet v. Deponthieu*, *ibid.* 132. note.

² *Sill v. Worswick*, 1 H. B. 691. ³ This section is taken from the *Solomons v. Ross*, *ibid.* 131, note (a). 21 Jac. 1, c. 19, ss. 10, 11.

the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission. But any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt, either by way of mortgage¹ or assignment, duly registered according to the provisions of the ship register act,² is not to be invalidated, or affected, by this enactment.

And, 1st, as to what things are within the Statute.

The object of the above enactment is to remedy the mischief arising from a trader holding out a delusive responsibility to the world, by appearing to be possessed of a stock in trade, or of other valuable articles, which are the subjects of sale and immediate transfer. The goods and chattels, therefore, comprehended within the meaning of the statute, must be taken to mean *personal* chattels, and not to comprise chattels real. For the *possession*, and *power of disposing*, of goods and personal chattels, are the only evidences of ownership, to which persons dealing with traders generally look; but, with respect to *real* property, the fact of *mere possession* is not such evidence of ownership as to induce a creditor to *rely* on it; it being a matter of notoriety, that real estates are frequently mortgaged, and that the mortgagor usually remains in possession of the property.³ No creditor, therefore, can with reason say, that he has been deceived by the bankrupt's possession of property of that description.

Fixtures.] For this reason, *fixtures*, and things affixed to the freehold, that are mortgaged with the premises to which they belong,⁴ are not within the above enactment. But

¹ A mortgagee of a ship was not formerly so protected. *Stephens v. Sole*, 1 Ves. 352. *Hay v. Fairbairn*, 2 B. & A. 193. *Monkhouse v. Hay*, 2 B. & B. 114, 4 Moore, 57, 8 Price, 256. *Kirkley v. Hodgson*, 1 B. & C. 588.

² The act then in force was the

4 Geo. 4, c. 41. The one now in force is the 3 & 4 Will. 4, c. 55.

³ *Ryal v. Rolle*, 1 Atk. 168, 1 Ves. 348. *Ex parte Taylor*, Mont. 240.

⁴ 1 Atk. 176. *Horn v. Baker*, 9 East, 215.

moveable utensils not fixed to the freehold, such as a *brewer's* or *distiller's vats*,¹ or a *dyer's plant*,² will be affected by it; unless, indeed, they are utensils of a *particular trade*, in which there is a *well-known usage* for the trader to have those utensils let to him on hire,—the possession of them, in that case, not imposing on the world a false appearance of property in the possessor,³—as in the manufacturing counties, where it is a common practice for the working hosiers, spinners, and weavers to have on hire the possession of *stocking-frames*, and other valuable machines, which they are unable to purchase. And the same exception, perhaps, will be found to apply to the case of *job horses* and *carriages*, which it is a well-known practice to have on hire.⁴ So, where a *colliery* was demised to the bankrupt, with certain engines, machinery, and implements, which were to be rendered up to the lessor at the expiration, or other sooner determination, of the lease, and, the tenant failing in the payment of the rent, the lease became forfeited, and the landlord recovered a judgment in ejectment, but did not execute the writ of possession until the day before the tenant became bankrupt; it was held, that the tenant never had under this demise the possession, order, or disposition of the engines and machinery, within the meaning of the 21 Jac. 1, c. 19, s. 10, (from which statute the above section is taken,) but a mere qualified right to use them during the term; and that, even if they had been in his possession within the meaning of the statute, they would have ceased to be so, when the landlord resumed possession by executing the writ of inquiry. Neither was the tenant considered to have such order and disposition of them, though he continued to work the colliery, and have the use of them during the intermediate time, between the recovery of the judgment in ejectment, and the execution of the writ of possession, a period of fifteen months.⁵ And indeed in all questions between *landlord and tenant*, the right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds

¹ 9 East, 215.

² *Bryson v. Wylie*, 1 B. & P. 83, note (a). 1 C. B. L. 234. Ex parte *Dale*, Buck, 365. *Lingard v. Messiter*, 1 B. & C. 308.

³ Per Le Blanc, J., 9 East, 244; and see *Storer v. Hunter*, 3 B. & C. 368. *Rufford v. Bishop*, 5 Russ.

346. *Watson v. Peache*, 1 Bing. N. C. 327. 1 Scott, 149.

⁴ Per Lawrence, J. 3 Taunt. 490. Ex parte *Wiggins*, 2 D. & C. 269.

⁵ *Storer v. Hunter*, 3 B. & C. 368. *Combs v. Beaumont*, 6 B. & Ad. 72.

the premises, under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, who still continued in possession, removed and sold a fixture put up by the lessee for the purposes of trade; it was held that they had no right to remove it, and that the lessor might recover it in trover,¹ for tenant's fixtures are not goods and chattels within the clause of reputed ownership.²

So, in questions between mortgagor and mortgagee, whatever is affixed to the freehold by the owner of the inheritance, is to be considered as a fixture until severed by him, and whether so affixed *before* or *after* the mortgage, or whether erected for the purpose of trade or otherwise, passes absolutely to the mortgagee.³ Therefore, where the tenant in fee of a cotton-mill, in which there was a steam-engine, mortgaged the mill, but remained in possession until his bankruptcy; it was held, that, notwithstanding the principal parts of the steam-engine might have been removed without injury to the building, it was not in the order and disposition of the bankrupt, so as to pass to his assignees.⁴ And the same principle has been established in numerous other cases.⁵

So, it has been held that an *equitable* mortgage of leasehold premises will carry all the fixtures, although erected for the purposes of trade, and therefore removable as between landlord and tenant, and although they are not specified in the lease deposited, or the memorandum of deposit.⁶

The following case, however, is somewhat at variance with the principle above laid down, as to *machinery* and *utensils* affixed to the freehold:—

Two partners who were seised in fee of certain freehold premises, occupied by them for the purpose of carrying on the business of calico-printers, had placed the machinery

¹ *Weeton v. Woodcock*, 7 Mee. & W. 14.

² *Ex parte Heathcote*, 2 M. D. & D. 711.

³ *Ex parte Belcher*, 4 D. & C. 703. *Ex parte Watkins re Reinagle*, 1 Dea. 296. *Ex parte Cotton*, 2 M. D. & D. 725. *Hitchman v. Walton*, 4 Mee. & W. 409. *Ex parte Scarth*, 1 M. D. & D. 240. *Ex parte Bentley*, 2 M. D. & D. 591. *Ex parte*

Reynal, *ibid.* 443. *Ex parte Price*, *ibid.* 518.

⁴ *Hubbard v. Bagshaw*, 4 Sim. 326.

⁵ *Clark v. Crownshaw*, 5 B. & Ad. 804. *Ex parte Loyd*, 3 D. & C. 765. *Boydell v. M'Michael*, 3 Tyr. 974. 1 Cr. Mee. & R. 177. *Ex parte Wilson*, 4 D. & C. 143. *Ex parte Spicer*, 2 Dea. 335.

⁶ *Ex parte Broadwood*, 1 M. D. & D. 631.

and utensils for the purposes of the business, and then mortgaged them, together with the fixtures to the freehold, and remained in possession of the property until their bankruptcy, and it was held that the machinery and utensils having been affixed to the inheritance for the purpose of trade only, in a place where as such they would commonly have been removed by a tenant, as trade fixtures, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only which passed to the assignees.¹

Shares in a public company.] Shares in a public company, whose funds arise wholly from the rents in tolls issuing out of real estate, are not within the clause of reputed ownership. But where by the act of incorporation, the shares are expressly declared to be personal estate, they are then within the clause of reputed ownership.² And it seems that the shares in a commercial company possessing lands in a foreign country, for the purposes of trade, are not to be considered as real property.³

Choses in action.] All *choses in action*⁴ are within the enactment; as bonds,⁵ bills of exchange,⁶ and policies of insurance,⁷ as well as a share in a newspaper,⁸ stock in the public funds,⁹ and a patent for an invention,¹⁰ but not a debt secured by a mortgage of freehold property.¹¹

2. What Possession is within the Statute.

As to what *possession* will constitute a case of reputed ownership, within the meaning of the above enactment, that is a question more of the *fact* than of *law*, and as such, is peculiarly within the province of a jury to determine.¹² The *possession* of property is, of course, *prima facie* evidence of

¹ *Trappes v. Harter*, 3 Tyrr. 603. 2 Cr. & Mees. 153. And see *Ex parte King*, 1 M. D. & D. 119.

² *Ex parte Lancaster Canal Company*, Mont. 116. 1 D. & C. 411. *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

³ *Ex parte Richardson*, 3 Dea. 496.

⁴ *Ryall v. Rolle*, supra, per Lord K., 7 T. R. 235.

⁵ *Falkner v. Case*, 1 Bro. 126.

⁶ *Hornblower v. Proud*, 2 B. & A. 327.

⁷ *Falkner v. Case*, cit. 2 T. R. 491. *Ex parte Smith*, Buck, 149. 3 Mad. 63.

⁸ *Longman v. Tripp*, 2 N. R. 67. ⁹ *Ex parte Richardson*, Buck, 180.

¹⁰ *Ex parte Granger*, Evans's Statutes, title "Bankrupt," 64; and see ante, 389.

¹¹ *Ex parte Mackay*, 1 M. D. & D. 550. *Jones v. Gibbons*, 9 Ves. 407.

¹² *Doug.* 317. 1 B. & P. 89. 9 East, 241.

reputed ownership; and more or less strong, according to the circumstances under which that possession was acquired, or is retained. The possession, however, must be acquired *before the act of bankruptcy*, and must be continued down to the very time of the bankruptcy¹ in order to constitute a possession within the meaning of the statute.

Therefore, where a communication was made to the board of directors of a joint stock company of the previous transfer of shares by the bankrupt, and afterwards on the same day he committed an act of bankruptcy, it was held that the shares were not in his reputed ownership at the time of his bankruptcy.² And it has lately been decided, that where goods are suffered by the true owner to remain in possession of a trader until after a secret act of bankruptcy, but are taken possession of by him before the issuing of the fiat, they do not now, since the 2 & 3 Vict. c. 29, pass to the assignees.³

When a bankrupt has *once* been the ostensible owner of property, and he *continues* in the *visible possession* of it at the time of his bankruptcy, that is a very strong case of reputed ownership, and can only be rebutted by clear proof, not only that there has been a transfer of the property from the bankrupt, but that such transfer was notorious to the world; for, when a man has been at one time the real owner of property, the presumption is that he continues so, where there is no change of possession.⁴ But *mere continuance in possession* by an assignor (under pecuniary embarrassments) of property assigned, though always suspicious, is not of itself a *conclusive* badge of fraud.⁵ So, the fact of *possession*, without any evidence of *reputation* of ownership, may not be sufficient of itself to bring the case within the statute; or, at least, not without showing *how* or *when* the bankrupt became possessed. And in all these cases, where the facts are proved, which amount to a disposition of the property by the bankrupt as owner, *general evidence* may be given of his being *reputed* to be the owner.⁶ But the inference of ownership, from the possession, and even from reputation of ownership, may be rebutted by evidence contradicting that reputation.⁷

¹ *Ody v. Cookney*, 1 Tyrr. & G. 536.

² *Ex parte Richardson*, 3 Dea. 496.

³ *Pariente v. Pennell*, 2 Mood. & R. 517.

⁴ *Per Holroyd, J.* 1 B. & C. 314; and see *ex parte Castle*, 3 M. D. & D. 117.

⁵ *Hoffman v. Pitt*, 5 Esp. 25. *Eastwood v. Brown*, 1 Ry. & M. 312; see vide per Buller, J., *Edwards v. Harben*, 2 T. R. 697.

⁶ *Oliver v. Bartlett*, 1 B. & B. 269; and see *Muller v. Moss*, 1 M. & S. 335.

⁷ *Gurr v. Rutton*, 1 Holt, 327, *Per Gibbs, C. J.*

Secret transfers.] Independently, however, of any consideration of *bankruptcy*, it is a general rule of law, that all *secret* sales and transfers of personal chattels, unaccompanied by possession, are fraudulent and void, as against creditors; since the effect of them is, to enable a party to gain a false credit from the world. Therefore, where a creditor took an *absolute* bill of sale of his debtor's goods, but agreed to leave them in his possession for a limited time, the bill of sale was held void against creditors,¹ and the like, in the case of an assignment to trustees, where possession did not accompany and follow the deed.² So also where the a father, in consideration of natural love and affection, assigned to his son certain pictures and effects upon trust, to permit the father to have the present use and enjoyment of them during his life, and subject thereto to the proper use and benefit of the son, and formal possession was delivered to the son, upon the execution of the deed, by the delivery of one picture in the name of the whole, and the father remained in possession till his bankruptcy; it was held that his assignees were entitled to the effects.³ But where an agreement, for the transfer of household furniture and farming stock, was *notorious* in the neighbourhood, although possession in this case was retained by the bankrupt for a certain period, pursuant to the stipulations of the agreement,—such a possession was held not to be within the statute.⁴ So, where a person (though in embarrassed circumstances) sold and assigned to a creditor all his interest in a leasehold house in which he resided, together with the whole of the furniture and household effects, continuing in the occupation of the house and furniture precisely in the same manner as before, but it did not appear that the creditor had given less than the *full value* of the property; and the assignor had, in fact, *with the purchase money, paid the debts of several of his other creditors*; this was held to be a valid transaction (in the absence of any fraud) against an execution creditor.⁵ And Lord Tenterden said, that he had no doubt that the purchase of a house and furniture, with an immediate demise of them to the vendor, may be good, if there be no intention to defeat or delay creditors by the trans-

¹ *Edwards v. Harben*, 2 T. R. 587. *Wordall v. Smith*, 1 Camp. 333.

² *Ex parte Castle*, 3 M. D. & D. 117.

⁴ *Muller v. Moss*, 1 M. & S. 335.

³ *Bamford v. Baron*, 2 T. R. 594; and see *Worsley v. De Mattos*, 1 Burr. 467.

⁵ *Eastwood v. Broun*, 1 Ry. & M. 312.

action.¹ In all these cases, however, the real question seems to be, whether the bankrupt was held out to the world as the owner of the goods, and obtained credit by the possession of them.²

Secret execution.] Where an *execution* is levied on a trader's goods, but is *concealed* for a length of time, and the trader remains in possession of the goods, and carries on business as usual, this is a case of reputed ownership within the statute.³ And the same, where the *warrant* was directed to the trader's servant and another person, as special bailiffs, and they took possession of the goods in the shop, but the business was carried on as usual, though without the trader's interference; for the possession of the servant in this case was considered to be the possession of the master.⁴ Nor does it make any difference that, after the utensils or goods are sold under such an execution, they remain in the trader's possession at a *yearly rental* for the use of them.⁵ Thus, where a creditor took the furniture of a coffee-house keeper in execution, which, without ever being removed, he afterwards let to him at a yearly rent; such a possession was held to be within the statute.⁶ And though, in one case of this kind, the creditor's initials were actually marked on all the goods, it was held, that this was not sufficient evidence of the *notoriety of the charge* of property,⁷ so as to defeat the claim of the assignees. So, where a landlord distrained for rent in arrear before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in possession; and after the bankruptcy, the landlord dis-

¹ Ibid. 313. But see *Sinclair v. Stevenson*, post, 409. Lord Ellenborough, in his judgment in *Muller v. Moss*, supra, appears to make a distinction in favour of an assignment of furniture (where the assignor continued in possession), that the right to do so formed a *part of the contract*; and the Vice-Chancellor, also, was inclined to draw a similar distinction, where the delay of possession was consistent with the deed. *Hartley v. Smith*, Buck, 380. But this was a part of the contract in *Edwards v. Harben*, where the bill of sale was held void. The better distinction seems to be the one taken by Lord Coke; who

recommends, that a gift in satisfaction of a debt by a person who is indebted to others also, should be made *publicly*, and not in private; for secrecy, he says, is a mark of a fraud. *Twyne's case*, 3 Co. 80; and see *Kidd v. Rawlinson*, 2 Bos. & P. 59.

² *Hickenbotham v. Groves*, 2 C. & P. 492.

³ *Toussaint v. Hartopp*, 1 Holt, 335.

⁴ *Jackson v. Irvin*, 2 Camp. 48.

⁵ 1 B. & P. 82.

⁶ *Lingham v. Biggs*, ibid.

⁷ *Lingard v. Mossiter*, 1 B. & C. 308.

trained again for the very same arrears of rent; it was held that the second distress was void, and that the goods passed to the assignees, as being in the order and disposal of the bankrupt at the time of the bankruptcy.¹ But, where an execution was *notorious in the neighbourhood*, and the goods were *bonâ fide* sold; then it was held (notwithstanding the continuance of possession by the debtor) that they were protected from subsequent executions,²—and also (as it should seem to follow) from any claim of the assignees of the debtor, if he becomes bankrupt; for there can be no *reputed ownership*, of property in a person possessing it, which is *known* to have been seized in his possession by the process of the law.

Colourable lease.] Where, however, after a notorious sale of a dyeing plant and other fixtures to a trader, there was a *private re-sale* of them to the vendor, and then a lease from the vendor to the trader, and *he* appeared to the world as the absolute owner; this, Lord Mansfield said, was an experiment to defeat the bankrupt laws, and ought not to prevail against³ the assignees. So also, where a retiring partner leased to the others, who continued the business, certain stills, vats, and utensils proper for carrying it on, and which had been *used by the former partnership*; it was held, that (the continuing partners having become bankrupt) all such utensils as were not fixed to the freehold passed to the assignees, as being in the possession, order and disposition of the bankrupts, as reputed owners.⁴

It will be observed in the above class of cases, that the bankrupt *had once been the absolute owner*, or *part-owner*, of the property, which was afterwards leased to him; and that the principle on which they were decided was, that the change of property was *not sufficiently notorious*, so as to prevent the world from being deceived by the countenance of possession. But it has also been held, where the bankrupt was *not the previous owner*, that a *colourable lease* to him of the property, of which he has the *exclusive possession*, and over which he exercises *complete control*, will not take the case out of the statute. Thus, where a trader, on leaving off trade, sold the concern to the bankrupt, with the

¹ Ex parte *Bradley*, 1 D. & C. 823. *Joseph v. Ingram*, 8 Taunt. 223. 838.

² *Latimer v. Batson*, 4 B. & C.

652. *Leonard v. Baker*, 1 M. & S.

251. *Watkins v. Birch*, 4 Taunt.

³ *Bryson v. Wylie*, 1 B. & P. 83, note (a.) 1 C. B. L. 353.

⁴ *Horn v. Baker*, 9 East, 215.

stock, utensils, &c. under a deed, which (though in appearance a lease) was in effect a contrivance to secure the seller of the property interest, at 10 per cent., on the amount of the price until it should be paid; it was held, that this property (independently of the consideration as to the usurious interest) passed to the assignees, as property, of which the bankrupt was the reputed owner.¹

And where H. took a house in his own name, and put his own furniture therein for the use of the firm of H. & J., and the rent and other expenses were paid by the partner, the apprentices boarded and lodged there, and the house occupied entirely for the purposes of the trade, J. living in the house, and H. himself residing elsewhere; it was held, that the furniture must be considered as in the reputed ownership of H. & J., and as forming part of the joint capital and stock of the partnership.²

But where furniture was let with a house to the wife of a person who afterwards became bankrupt, it was held that this did not pass to the assignees.³

And where utensils of trade, being the separate property of one of two partners, and insured in his name, were consumed by a fire, and afterwards a joint commission issued against both the partners, and the insurance money was paid to the joint assignees; it was held, that the separate estate was entitled to it, and not the joint estate, there being no *visible* property at the time of the bankruptcy; for, after the fire, the subject was in reality gone.⁴

Goods purchased and left.] Where goods, being the commodity in which a trader deals, are purchased of him, and left in his keeping by the purchaser, undistinguished from the rest of his stock, they will be considered to be in his possession, order, and disposition, within the meaning of the statute, notwithstanding there is even a custom of the trade in the particular species of goods (which in this instance were hops) for the purchaser to leave the goods in the merchant's warehouse, subject to a rent for warehouse-room; for such a custom does not enable *other* persons, out of that trade, to know that the goods so left are not the property of the ⁵ possessor. So, where A. sold to B. several casks

¹ *Sinclair v. Stevenson*, 2 Bing. 334. And see *Newport v. Hollins*, 514. 1 Carring. 582. 10 Moore, 3 C. & P. 223.

48.

⁴ *Ex parte Smith*, Buck, 149.

² *Ex parte Hare*, 1 Dea. 16.

⁵ *Thackthwaite v. Cock*, 3 Taunt.

³ *Burton v. Hughes*, 9 Moore, 487.

of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper; and it was agreed between the parties, that the brandies should remain where they were, until B. could conveniently remove them; B. then immediately marked the several casks with his initials, and it was notorious to the persons carrying on the wine trade at the place where the parties lived, that the sale had taken place; but no notice of the sale was given to the warehouse-keeper, with whom some of the casks were deposited: under these circumstances it was held, upon A.'s bankruptcy, that the whole passed to his assignees, as being in his order and disposition; for that it was not sufficient, that the change of property was known only to persons in the *same trade*, but the transfer ought to have been known to *all other persons*, who might, in consequence of the bankrupt's continued possession of the brandies, have been induced to give him credit.¹

These cases, however, are somewhat at variance with two others in the court of Chancery, one of which was decided by Lord Hardwicke, and the other by Sir J. Leach. In the first of these, the facts were, that two-thirds of a quantity of tar (then lying on the quay at Liverpool) were purchased of the bankrupt, and the whole was, pursuant to agreement, put into the bankrupt's warehouse, until the purchaser should give orders for shipping the same off as opportunity offered, and the purchaser also duly paid for the tar; upon which Lord Hardwicke held, that, as the possession of the tar was merely a *temporary custody*, it could not with any propriety be said to be in the order, disposition, or power of the bankrupt.² This case was cited in argument in the above case of *Knowles v. Horsfall*, and was attempted to be distinguished from that, on the ground, that in this the goods were to be left in the possession of the bankrupt only until they could be conveniently shipped; but in that case, also, the brandies were only to remain with the vendor, until the vendee could conveniently remove them. There does not, in truth, seem any material difference between the two cases,—except, indeed, that the circumstances in *Knowles v. Horsfall* were, upon the whole, more in favour of the purchaser; for in that case the casks were *marked* with the purchaser's initials. In the other case alluded to

¹ *Knowles v. Horsfall*, 5 B. & A. 134; and see *Muchlow v. Mangles*,

3 Taunt. 318, post, 420. *Leake v. Loveday*, 4 Man. & G. 972.

² *Ex parte Flynn*, 1 Atk. 165.

before Sir J. Leach, a pipe of wine had been purchased of the bankrupt, and, after being bottled off, was set apart in a particular bin in the bankrupt's cellars, distinct from the rest of his stock, each bottle being marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser; and, in this case, Sir John Leach thought, that the wine was not in the possession of the bankrupt under such circumstances, as would *deceive his creditors*, by any appearance of its forming part of that stock, to which they might give credit.¹ And this, after all, appears to be the true criterion for determining every case of *reputed ownership*; for, if the goods are so distinguished by the mark of the true owner, or so separated from the rest of the bankrupt's stock, as to render it impossible for any person dealing with him to be deceived by any appearance of property in the bankrupt; then, it is apprehended, upon no principle whatever can the goods be said to be in the possession of the bankrupt, as *reputed owner*, at the time of his bankruptcy.

Accordingly, where A. on the 17th February bought of B. ten tuns of oil, which were paid for by A.'s acceptance for the amount of the price, and, upon the completion of the purchase, the oil was drawn off from the cisterns in which B. kept his stock, and was put into nineteen casks, which were numbered and marked with B.'s initials, and removed into another warehouse, called the shipping warehouse, to await A.'s orders as to the shipment; and on the 9th March A. demanded the delivery of the oil, but B. having then suspended payment, said that he could not deliver the oil without authority, and on the 3rd April a fiat was issued against B.; it was held, that the oil was not in the possession of B. as reputed owner, within the meaning of the 6 Geo. 4, c. 16, s. 72, it being necessary to prove some reputation of ownership besides the mere fact of possession, to bring the case within the provisions of the enactment.²

Where a chariot was built to the plaintiff's order, and *paid for* by him, and when finished in other respects, the plaintiff ordered a front seat to be added, but the builder being slow in making this addition, the plaintiff repeatedly sent for the chariot, and the builder promised to deliver it; but the plaintiff being afterwards dissatisfied, ordered the chariot to be sold; and while it was, according to the custom

¹ Ex parte Marrable, 1 G. & J. 402.

² Ex parte Dever, 2 M. D. & D. 259.

of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignees seized the chariot; it was held, that the chariot did not pass to the assignees, as being in the order and disposition of the bankrupt with the consent of the owner; and that the plaintiff had sufficient property in the chariot to maintain trover for it.¹

But where the bankrupt had, before his bankruptcy, bought a quantity of timber on behalf of an unnamed principal, which he afterwards exchanged for a quantity of other timber, and at the same time bought more timber on his own account, all which was delivered to the bankrupt, and lay till after the bankruptcy on a common intermixed with and undistinguishable from the bankrupt's own timber; and the party for whom the bankrupt had bought the first quantity of timber wrote to the person who had made the exchange with the bankrupt, stating himself to be the principal, adopting the contract as to the timber taken in exchange, but as to no other, and directing that the bankrupt should not be suffered to take the timber, and the principal also required the bankrupt to deliver the timber belonging to him, upon which the bankrupt proposed to make up a deficiency in the quantity by delivering some of his own timber, but no contract of sale was made as to the latter, nor did anything further pass till within two months before the commission, when the bankrupt made a formal delivery to the principal of part of the sold and part of the exchanged timber lying on the common as above mentioned; it was held, that the whole of the timber was in the order and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy; for that the mere circumstance of acquainting the vendor, who had long before delivered the timber, and had no remaining control over it, that the bankrupt was merely an agent in the transaction, was not such an act as was necessary to determine the possession of the bankrupt, or the consent of the principal.²

Goods at a wharf, &c.] But all goods lying at a wharf, in the bankrupt's name, and for which he is liable for rent to the wharfinger, or over which he exercises any control on any part of the day of the bankruptcy, are held to belong to him as reputed owner; though it may be different, if the

¹ *Carruthers v. Payne*, 5 Bing.

270. *S. P. Bartram v. Payne*, 920.

3 C. & P. 176.

² *Shaw v. Harvey*, 1 B. & Ad.

goods are lying there in the name of his *agent*, and the bankrupt himself has no reputation of ownership attaching to them.¹ But if the goods are transferred into a purchaser's name in the wharfinger's books, at any time before the act of bankruptcy, then the reputation of ownership in the bankrupt is rebutted. Thus, where the purchaser of goods, then lying at a wharf in the name of the vendor, received from him an order on the wharfinger for their delivery,—though the order was not, in fact, carried to the wharfinger for several months afterwards (during which period the vendor had actually disposed of a part of the goods), and the vendor became bankrupt only nine days after the wharfinger had transferred the remainder of the goods into the name of the purchaser,—yet, as the transfer was made in the wharfinger's books previous to the bankruptcy, it was held, that a complete change of the property had taken place, and that the assignees were not entitled to the remainder² of the goods. So, where a creditor, who had blank delivery notes on a wharfinger deposited with him by the bankrupt to cover advances, filled up the blanks with his own name, and took possession of the goods only the *very day before* the act of bankruptcy, he was held entitled to the goods against the assignees.³ And, after a written order by the vendor for the delivery of the goods is merely *communicated to the wharfinger, and assented to by him*,—though no actual transfer be made in his books,—the property has been held to pass to the⁴ vendee. Therefore, where warrants of the West India Dock Company (for sugars deposited in their warehouses) were exhibited by a purchaser to the clerk of the company, this was holden sufficient to divest the seller of any reputed ownership, though *no actual transfer* was made in the company's books.⁵

So, where it is the known practice of a public company, to

¹ *Arbouin v. Williams*, 1 Ry. & M. 72; and see *Taylor v. Robinson*, 8 Taunt. 648. 2 Moore, 730.

² *Jones v. Dwyer*, 15 East, 21.

³ *Arbouin v. Williams*, *supra*.

⁴ *Lucas v. Dorrien*, 7 Taunt. 278. 1 Moore, 29. *Harman v. Anderson*, 2 Camp. 245. *Tucker v. Ruston*, 2 C. & P. 86.

⁵ *Ibid. Spear v. Travers*, 4 Camp. 251. It was observed by the special jury in this case, that, in practice, the indorsed dock warrants are handed from seller to

buyer, as a complete transfer of the goods. (4 Camp. 253; and see 8 Taunt. 290. Per Dallas, J.) In all these cases, therefore, it should seem, that the dock warrants having been once exhibited by the holder to the proper officer of the company, are in themselves the true symbols of the ownership of the goods. And, indeed, they are now declared to be so by the act of 6 G. 4, c. 94, s. 2; and see post, "Lien."

deliver goods to the mere *holder* of their warrants, without any indorsement on the warrant by the original owner of the goods,—in that case, the bare possession of the warrants by any one, to whom they are delivered for a valuable consideration, is sufficient to rebut a case of reputed ownership in the person, to whom the goods originally belonged. Thus, where a trader had pledged for value warrants for goods in the East India Company's warehouses, which warrants are current in the market, and transferable without indorsement, and the goods are delivered to the person who brings the warrants to the warehouse, and the trader became bankrupt whilst the warrants were in the possession of the pawnees;—it was held, that the goods were not in the possession, order, and disposition of the bankrupt at the time of the bankruptcy.¹

But where it is the custom of a dock company to acknowledge no title in goods deposited in their warehouses, unless accompanied with possession of dock warrants *indorsed* by the party to whom they were originally issued, in that case the goods are not in the order and disposal of a party holding the warrants without indorsement.²

So, where goods are in the possession of any agent who has a lien on them, they are not within the clause of reputed ownership.³

But, where a captain in the East India Company's service assigned his privilege (which consists in shipping goods to the extent of a certain tonnage from the East Indies to England) to one Taylor for a valuable consideration, in breach of an express law of the company, which prohibits such assignments; and, in order to evade this law, the goods were shipped, entered, warehoused, and sold by Taylor in the *captain's name* and the proceeds carried to *his account*; but, before they are handed over by the company, the captain became a bankrupt, and Taylor was in possession of no document, which he could have carried to a market for the purpose of disposing of the goods, or the proceeds; it was held, in this case, that the assignees were entitled to recover the amount, in an action for money had and received against the East India Company, the proceeds being considered to be within the order and disposition of the bankrupt at the time of the bankruptcy.⁴

¹ *Greening v. Clark*, 4 B. & C.

² *Ex parte Taylor*, Mont. 240.

³ *Ridout v. Lloyd*, Mont. 103.

⁴ *Gordon v. E. I. Company*,

⁵ *Ex parte Davenport*, 1 D. & C. 7 T. R. 228.

Goods on sale or return.] Where goods have been bought by a bankrupt upon sale or return, such goods, when in his possession at the time of his bankruptcy, are held to pass to his assignees; as they appear to the world to be his property, and are calculated to give him a delusive credit.¹ But where goods were sent from London to Sunderland, on sale or return, with directions to the buyer to return such of them as were not approved of by him, in as short a time as possible; and the goods arrived at the shop of the buyer only the day before he committed an act of bankruptcy; it was held, under these circumstances, that the goods did not pass to his assignees, as a reasonable time had not elapsed after the arrival of the goods, to enable the buyer to select such as he might be disposed to retain.² There may be an usage, also, in a particular trade, to send goods on sale or return, though there is no agreement to that effect between the parties; but then the usage must be certain, and must be strictly proved.³ The meaning of such a contract or usage is, not to place the purchaser upon the footing of a factor—though he, like a factor, had formerly no authority to pledge⁴—but to vest the property of the goods in him so far, that he may sell them either for money or credit, and receive the proceeds; and if he is unable to sell them, the vendor cannot call upon him for the value of the goods, but has only a right, if his bankruptcy does not intervene, to reclaim them *in specie*.⁵

Goods actually delivered.] When goods, however, are once delivered to a vendee upon an ordinary contract of sale, the property is wholly changed by delivery, notwithstanding the goods may be obtained by the vendee, even with intent to defraud the vendor of the price; and the latter cannot take them back, after an act of bankruptcy committed by⁶ the vendee; though, perhaps, if the goods had been obtained by the vendee under false pretences, then the vendor might recover them back from the vendee, or his assignees.⁷ And if a person order goods to be sent to him at night, and early the next morning commits an act of bankruptcy, he must be taken to have obtained possession of them by artifice or

¹ *Livesey v. Hood*, 2 Camp. 83. Sed vide per Abbott, C. J. *Delaney v. Barker*, 2 Star. 542.

² *Gibson v. Bray*, 8 Taunt. 76. 1 Moore, 519.

³ *Wood v. Wood*, 1 Car. 59.

⁴ See now 6 G. 4, c. 94, s. 5, post, "Lien."

⁵ Per Gibbs, C. J. 1 Holt, 556.

⁶ *Milward v. Forbes*, 4 Esp. 171; but see post.

⁷ *Gladstone v. Hadwen*, 1 M. & S. 517; and see post.

fraud.¹ A delivery of goods cannot be qualified by any secret stipulation between the vendor and purchaser, so as to defeat the claims of the assignees of the purchaser, in case he becomes bankrupt; nor, even though the goods are not actually delivered, will any secret stipulation have that effect, if the vendee be permitted to exercise such a control and management over the goods down to the time of his bankruptcy, as to give him the appearance of being the real owner. Thus, where a bankrupt had entered into an agreement, that, in the event of his becoming bankrupt or insolvent, before payment made of a quantity of standing timber purchased by him, the vendor should retake the same; it was held, that if the bankrupt had the order and disposition of the timber, it would pass to his assignees.²

Property removed on the eve of bankruptcy.] It has been held in one case, that if the real owner of property, such as household furniture, permits it to remain so long in the possession of the bankrupt, as to give him the reputed ownership of it in the opinion of all who deal with him, and the owner only takes possession of it *the day before* the bankruptcy, — that such re-possession is fraudulent against the creditors,³ and that the property passes to the assignees. But we have already seen, in the case of property lying at a wharf, where it did not appear that persons were deceived by any apparent ownership of the bankrupt, and the real owner only took possession of it *one day before* the bankruptcy, that the transaction was not impeached on that account.⁴ So, where the true owner had permitted his goods to remain in the order and disposition of the bankrupt until the day before his bankruptcy, and then demanded the possession of them, which the bankrupt refused to deliver, it was held that they did not pass to the assignees.⁵ Where the removal of the property takes place on *the very same day* on which an act of bankruptcy is committed—notwithstanding, in point of time, it is really before the *actual commission* of it—then it has been held, that the rights of the assignees attach.⁶

¹ D. per Best, C. J. *Sinclair v. Stevenson*, 10 Moore, 53.

² *Holroyd v. Gwynne*, 2 Taunt. 176. The circumstance of the property in question in this case being part of the freehold, and therefore not within the provision of the statute (which applies only to personal property), does not ap-

pear to have been adverted to. See ante, 403.

³ *Darby v. Smith*, 8 T. R. 82.

⁴ *Arbousin v. Williams*, 1 Ry. & M. 72. Ante, 412.

⁵ *Smith v. Topping*, 5 B. & Ad. 674.

⁶ *Arbousin v. Williams*, supra.

Newspaper.] Where the printer and publisher of a *newspaper* assigned his interest in it to a creditor, as a security, but continued to print and publish it as before, and no affidavit of the change of interest was delivered to the commissioners of stamps; it was held, on his bankruptcy, that the right to the newspaper passed to his assignees.¹

Shares in a public company.] So, where a director of a public company assigned his shares to the company, in order to secure a debt due from him on his private account, and empowered the company to direct the treasurer to retain the dividends, and sell his shares for the payment of his debt; but the power given to the company had not been exercised, and his shares still remained in his name; it was held, that, on the bankruptcy of the director, the shares passed to his assignees, as being in his order and disposition, but that the company had a right to set off the bankrupt's debt against the dividends due to him at his bankruptcy.²

So where the director of a joint-stock company mortgaged his shares, but stipulated that no notice should be given of the transaction to the company, and accordingly no notice was given to the company of the transfer; the shares were held to be in his order and disposition at the time of his bankruptcy.³ And the same was also determined in another case, although part of the property of the company consisted of a copyhold estate.⁴

Upon the same principle it has been held in equity, that a mortgagee of shares in a joint-stock company must give notice of his incumbrance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration, without notice.⁵

And wherever an act incorporating a company prescribes a certain form in the transfer of shares, the shares remain in the order and disposition of the bankrupt proprietor, unless such form is strictly complied with. And though the act may only expressly relate to transfers between third parties, yet it is held impliedly to relate to cases where the company themselves are the transferees.⁶

And where by the rules of an insurance company no

¹ *Longman v. Tripp*, 2 N. R. 67.

² *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

³ *Ex parte Nutting*, 2 M. D. & D. 302. *Ex parte Spenser*, 1 Dea. 466.

⁴ *Ex parte Vallance*, 2 Dea. 354.

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⁵ *Cumming v. Prescott*, 2 Younge & C. 488.

⁶ *Ex parte Lancaster Canal Company*, 1 D. & C. 411. *Ex parte Dobson*, 2 M. D. & D. 685. *Ex parte Pooley*, 2 M. D. & D. 505, *contra*.

person, except a director, could hold more than two shares in his own name, but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party; and the petitioner, who was already the owner of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary; and the bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of this trust was taken in the books of the company, and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner up to the period of his bankruptcy, when the shares were still standing in his name; it was held, that this was such a secret trust as was not within the 79th section of 6 Geo. 4, and that the shares passed to his assignees, as being in his order and disposition at the time of his bankruptcy.¹

So, where by the rules of a joint-stock company only principals could become subscribers, and the petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as trustee for the petitioner; and the certificates of the shares were kept in possession of the petitioner, but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust, until seven days before the fiat was issued; it was held, also, in this case, that the shares were in the order and disposition of the bankrupt.²

But where by the deed of settlement of a banking company it was stipulated that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors, and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor; and the bankrupt at the time of his bankruptcy was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances; it was held that these shares did not pass to his assignees under the clause of reputed ownership, so as to defeat the lien of the bank, which had been provided for in the deed.³

¹ *Ex parte Burbridge*, 1 Dea. 131, reversing *ex parte Watkins*, 4 D. & C. 87.

² *Ex parte Ord*, 1 Dea. 166.

³ *Ex parte Plant*, 4 D. & C. 160.

And where by the rules of a company no shares could be transferred without the consent of A., the managing director, and A. accordingly received all applications for the transfer of shares, and the bankrupt had agreed with A. that certain shares of the bankrupt should be a security for the payment of a bill accepted by A. for the accommodation of the bankrupt, and which the bankrupt discounted with B., with whom the certificates of the shares were deposited, but no formal notice to the company was given of the transaction, until four days before the fiat issued, nor was any transfer made in the books of the company of the shares, which were still standing in the bankrupt's name at the time of the bankruptcy; it was held, nevertheless, that the shares were not in the order and disposition, or reputed ownership of the bankrupt.¹

So where a proprietor of shares in a banking company contracted to assign a certain number of shares to them, as a security for advances, and afterwards became bankrupt; it was held that this contract gave the bank a lien on the shares, and that the same was not in his order and disposition.²

And it has been since held that the reputed ownership of shares is a fact to be proved, and is not to be conclusively inferred from the absence of notice of any lien on them of a third person.³

Where the bankrupt on the 1st March deposited with the petitioner certificates of shares in a German mining company, for securing a loan of money, which she sealed up in a packet, and entrusted the bankrupt to keep it in his iron safe, for better security, where it remained until three weeks before his bankruptcy, when it was reclaimed by the petitioner; and the bankrupt, long before his bankruptcy, told one of the directors of the company that he had deposited the certificates with the petitioner, and this director, on the morning of the 7th December, communicated that fact to the board of directors, and in the evening of that day the act of bankruptcy was committed; it was held, that the shares were not in the order and disposition of the bankrupt, or in his reputed ownership, at the time of his bankruptcy.⁴

¹ *Ex parte Harrison*, 3 Dea. 185.

² *Pinkett v. Wright*, 2 Hare, 120.

³ *Ex parte Pooley*, 2 M. D. & D. 505. And see *ex parte Cooper*,

Id. 1. *Ex parte Rose*, Id. 131. *Ex parte Pooley*, Id. 505. *Ex parte Heathcoate*, Id. 711.

⁴ *Ex parte Richardson*, 3 Dea. 496.

Patent.] Where the bankrupt had a *patent* for an invention, and, after having mortgaged his right in it, continued in the notorious use of the invention until his bankruptcy,—Lord Eldon was inclined to think that the right passed to the assignees; but he directed a case for the opinion of the court of King's Bench, which, however, was never argued.¹

Stock.] The possession of the bankrupt, in order to bring a case within the statute, must be *with the consent and permission* of the true owner.² Therefore, where stock standing in the name of the accountant-general was mortgaged to secure a debt, and the accountant-general afterwards, *without the privity* of the mortgagee, transferred the stock to the mortgagor,—it was held, that it did not pass to the assignees on the bankruptcy of the mortgagor.³

Infants.] So the property of *infants*, who are not capable in law of giving consent, is not affected by a case of *reputed ownership*.⁴ But where a *trustee* for infants contracted to sell goods, and he afterwards let the purchaser into possession, in this case, the property was holden to be within the statute; the trustee being considered the true legal owner of the property, and the purchaser being in possession with his consent.⁵

Adverse possession.] If a bankrupt retains *adverse possession* of goods up to the time of his bankruptcy, so that the party entitled to them could not obtain the possession, or restrain him from disposing of them, without suing him in a court of justice,—such a possession of the bankrupt will, of course, not be within the meaning of the statute; as this is *against* “the consent and permission of the true owner.”⁶

Secret partner.] In the case of a *secret partnership* between the bankrupt and another person, where the stock in trade is in the *sole possession* of the bankrupt,—Lord Alvanley upon an occasion of this kind expressed great doubt whether the claim of the *secret partner* to a share

¹ Ex parte Granger, Evans's Statutes of Bankruptcy, 64.

² West v. Ship, 1 Ves. 243.

³ Ex parte Richardson, Buck, 480.

⁴ Viner v. Cadell, 3 Esp. 88.

⁵ Ex parte Dale, Buck, 365.

⁶ West v. Ship, supra. Litt v. Cowley, 7 Taunt. 169.

in the joint property could be sustained, against the claims of the assignees.¹ And, indeed, a possession of property under these circumstances seems to come within the very terms of the above enactment as to reputed ownership. The court of Exchequer, however, in a case of this description determined, that the claim of the secret partner was sustainable;² though Lord Eldon, on a subsequent occasion, intimated a strong opinion to the contrary, but reserved the decision of the point for the assistance of those barons who had concurred in deciding in favour of the claim of the secret partner.³ This point, however, appears now to have since been finally settled by the court of King's Bench, upon a case sent for its opinion by the lord chancellor; in which the judges unanimously agreed, that where there was a *secret partnership*, all the property and effects, as well as the debts due to the concern, must be deemed to be in the order and disposition of the ostensible partner, and therefore passed to his assignees.⁴

But where S. and O. assigned all their stock and effects to trustees for the benefit of their creditors, and dissolved their partnership, and S. continued on the same premises, but carried on a different branch of trade, and soon afterwards took in U. as a partner; and it appeared that part of the stock of the former partnership of S. and O. was a quantity of New Zealand flour, which remained unsold upon the premises, but was separately warehoused and kept distinct from the stock of the new partnership, and was not adapted for the new manufacture carried on by S. and U., and a separate fiat was sued out against U., and six months afterwards a joint fiat against S. and O.; it was held that the trustees were entitled to the flour, and that the clause of order and disposition did not apply to such a state of circumstances.⁵

Ships at sea.] Where property is of such a nature that it *cannot be absolutely delivered* (at the time of the contract) to a purchaser, then it will be sufficient, if those documents and instruments relating to it are delivered, which will enable him to reduce the property into possession. Thus, in the case of *ships at sea*, and their cargoes, of which an

¹ *Biaford v. Dommett*, 4 Ves. and see *ex parte Wilson*, *ex parte* 756; and see *ex parte Barrow*, *Todd*, Buck, 53.

² *Rose*, 252.

³ *Coldwell v. Gregory*, 1 Pri. 119.

⁴ *Ex parte Dyster*, 2 Rose, 256; 694.

⁵ *Ex parte Enderby*, 2 B. & C. 389. And see post, 643, et seq.

⁶ *Ex parte Vardon*, 2 M. D. & D.

absolute delivery of possession cannot be made, it will be sufficient if the bill of sale, or bill of lading, is delivered to the purchaser, provided he takes possession of the property, upon the *arrival* of the ship in port.¹ But, in every case, whether of sale or mortgage, it is necessary that all the provisions of the *registry act*² should be strictly complied with; otherwise, the purchaser will not be entitled to hold the ship, as against the assignees of the vendor or mortgagor.³ The bill of sale of a ship at sea is held now to pass the *absolute property* in her, subject only to be divested, in case of the indorsement on the certificate of registry not being made within the proper time (which is now thirty days)⁴ after the arrival of the ship in port.⁵ And by 3 & 4 W. 4, c. 55, s. 36, purchasers and mortgagees are declared to have priority, not according to the respective times of the registry of the bill of sale, but according to the time when the indorsement was made at the Custom House upon the certificate of registry. A power of attorney to sign an indorsement on the certificate is not revoked by the subsequent bankruptcy of the vendor,—being only a power to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy. Therefore, if the indorsement is made within the limited time under such a power of attorney, though after the bankruptcy of the vendor, it will be a sufficient compliance with the terms of the registry act.⁶

Where the purchaser, however, has an opportunity of taking possession of the ship, either by her being at home at the time of the purchase, or by her returning to port, he must in that case take *actual* possession; otherwise, though all the requisites of the registry act are complied with, the transaction will come within the operation of the above enactment, as to the reputed ownership of the bankrupt.⁷ But, though the purchaser do not take actual possession as soon as he might,—yet, if the rights of no third person interfere, he may, afterwards, take legal possession

¹ *Brown v. Heathcote*, 1 Atk. 160.

² 3 & 4 W. 4, c. 55, which repeals all the former registry acts.

³ *Moss v. Charnock*, 2 East, 399.

Rolleston v. Hibbert, 3 T. R. 406.

Rolleston v. Smith, 4 T. R. 161.

Campbell v. Thompson, 2 Hare, 140.

⁴ 3 & 4 W. 4, c. 55, s. 36.

⁵ *Dixon v. Ewart*, 3 Meriv. 322.

Back, 94; and see post, "Relation."

⁶ *Ibid.*; and see *Lempriere v. Pasley*, 2 T. R. 485.

⁷ *Ex parte Matthews*, 2 Ves. 272.

Hall v. Gurney, 1 C. B. L. 342.

Atkinson v. Maling, 2 T. R. 462.

Mair v. Glennie, 4 M. & S. 240.

Hay v. Fairbairn, 2 B. & A. 193.

Robinson v. Macdonnel, 5 M. & S.

228. *Monkhouse v. Hay*, 4 Moore,

549. 8 Pri. 256. 2 B. & B. 14.

of the ship, if he does so before the bankruptcy of the person who executed the bill of sale to him.¹ And if, at the time of the sale, the ship is in any *foreign port*, then the purchaser need not take actual possession of her; and the port of Dublin is, in this respect, considered a foreign port.²

Where the purchase is only of a *share* in the ship, then the delivery of the bill of sale of such share (provided the requisitions of the registry act are in other respects complied with) will be a good delivery to vest a title in the purchaser.³ And in a case where a ship-builder contracted to build a ship to be paid for by four instalments, three of which were paid,—and he then signed the usual certificate in order to have the ship registered, and the ship *was accordingly registered* in the name of the purchaser, but was not then completed or launched, and was still in the possession of the ship-builder;—it was decided, that the legal effect of the ship-builder's having signed the certificate for registry in the name of the purchaser, was to *vest* the general property in the ship from the time the registry was completed, and that the ship was not in the possession⁴ of the bankrupt, as reputed owner. But where a barge, (which is not required to be registered,) after being completed, remained in the boat-builder's hands—though the purchaser's name was painted on the stern, and he had advanced money as the building of it went on, to the full value of the barge, but the builder had done no act expressing an unequivocal consent that the general property should be considered as vested in the purchaser,—in this case it was held, that, as there had been no *actual delivery* to the purchaser, the property⁵ was in the order and disposition of the bankrupt.

Under a fiat against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, are held to form part of the joint estate.⁶

An *executory contract* for the sale of a ship is within the provisions of the register act, and must, therefore, be indorsed on the certificate of the registry.⁷

¹ *Robinson v. Macdonnel*, 2 B. & A. 134.

² *Ex parte Batson*, 1 C. B. L. 345.

³ *Ex parte Standgroom*, 1 C. B. L. 348. 1 Ves. 163; and see *Gillespie v. Coutts*, Amb. 652, and *Hall v. Gurney*, 1 C. B. L. 342.

⁴ *Woods v. Russell*, 5 B. & A. 942.

⁵ *Mucklow v. Mangles*, 1 Taunt. 318; and see post.

⁶ *Ex parte Burn*, 1 Jac. & W. 378.

⁷ *Mortimer v. Fleeming*, 4 B. & C. 120.

Mortgage of ship.] Where the transfer of the ship, however, is not an *absolute* transfer, but merely made as a *security* for a debt, or by way of *mortgage*, then, as we have seen,¹ by the provisions contained in the 72nd section of the 6 Geo. 4, c. 16, it is excepted out of the enactment as to reputed ownership, — provided those requisitions of the registry act are complied with, which relate to transfers of ships by way of mortgage. And by the last register act, 3 & 4 W. 4, c. 55, s. 42, it is now expressly declared, that the person to whom such security or mortgage shall be made, shall not, by reason thereof, be deemed to be the owner of the ship or vessel, or of any share so transferred, nor will the person making the transfer be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship, or the share so transferred, available by sale or otherwise for the payment of the debt, for securing payment of which such transfer shall have been made. And by the 43rd section of the same act it is also provided, that when any such transfer shall have been duly registered, the right of the mortgagee shall not be affected by any act of bankruptcy committed by the mortgagor after the time of such registry, notwithstanding the mortgagor, at the time he became bankrupt, had in his possession, order, and disposition, and was the reputed owner of, the ship, or the share so mortgaged; but such mortgage shall take place of, and be preferred to any right of the assignees of such bankrupt in such ship or share so transferred.²

By the 36th section of the above act, in case any ship is absent from the port to which she belongs at the time of the registry of any bill of sale, the officers of the Customs are directed not to register any other bill of sale, purporting to be a transfer by the same vendor or mortgagor, unless thirty days shall have elapsed from the day on which the ship arrives in port.

Where W. R. mortgaged to W. and Co. the ships *Lady East*, *Pyramus*, and *Sprightly*, then being at sea, by bill of sale, containing also an assignment of the freight and policies, which was duly registered, and on the 18th October, 1830, the *Sprightly* returned to port, and sailed again on the 16th November; and on the 7th January, 1831, W. R. executed a second mortgage of the same ships, freights, and policies to the petitioners by bill of sale, containing a recital of, and subject to the first mortgage, which second bill of

¹ *Ante*, 402.

² See *ante*, 403, note (1).

sale was duly registered on the 11th May 1831; and on the 14th June W. R. became bankrupt, on which day the *Pyramus* arrived from sea, and on the 21st June both mortgages were indorsed on the certificate of the *Pyramus*; and the *Lady East* having arrived from sea on the 15th July, both mortgages were also indorsed on the certificate of the *Lady East* on the 16th July; and the *Sprightly* was lost at sea;—it was held, that the second mortgage was valid as to the interest in the ships, freights, and policies,¹ notwithstanding W. R.'s bankruptcy occurred before the lapse of thirty days after the ships arrived in port.

But, though the purchaser forfeit his title to the *ship*, as against the assignees of a bankrupt, by neglecting to take possession of her whilst she is in port,—he will still be entitled to the produce of a *policy of insurance* on her (which is assigned to him at the time of the bill of sale) in the event of a loss happening to the ship at sea before the bankruptcy.² And, though the policy was detained by the broker who effected it, as a pledge for a debt owing to him by the bankrupt, and the assignees obtained possession of it by paying that debt, yet they were held not entitled to retain it against the person to whom it was assigned; as this was considered not such a leaving of the policy in the hands of the bankrupt, as to give him the entire order and disposition of it.³

An equitable assignee is considered as the true owner of the goods assigned, within the meaning of the bankrupt law respecting reputed ownership. And therefore where the bankrupt, who had chartered a ship for the purpose of bringing home a foreign cargo, had made a valid equitable assignment of the cargo to a third person, but was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon any part of it, and had parted with no document that was essential to his power of disposal; it was held that the cargo passed to his assignees, as being in his order and disposition, with the consent of the true owner.⁴

Best possible delivery sufficient.] In all cases, where the *best delivery* is made upon the sale of goods, which the nature of the property, and the circumstances under which it is sold, will admit, the case will not then be considered as

¹ Ex parte Jones, 2 Cr. & J. 513.

² Ibid. 1 Bro. 125.

³ Tyrr. 671.

⁴ Belcher v. Capper, 4 Man. & G.

⁵ Falkner v. Case, cited 2 T. R. 502.
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one of reputed ownership. Thus, where the bankrupt contracted with a canal company to build locks and bridges on the canal as their engineer, and purchased timber and other materials for the purpose, which were laid on the company's premises; and, on the company advancing money to him, they took a bill of sale of these goods, and a *nominal delivery* of them *by a halfpenny*; it was held, that the bankrupt had not, under these circumstances, such a possession of the timber as would enable the assignees to claim it in opposition to the bill of sale; for that the timber being before the sale *on the company's premises*, the best delivery was given of it which the circumstances would admit.¹

Notice of assignment of chose in action.] Whenever a *chose in action* is assigned, the security, if there be one, must in all cases be delivered over at the time of such assignment; and, in order completely to divest the bankrupt of the ownership of *debts*, he must, in assigning them, have done every thing that is equivalent to the delivery of chattels personal.² Thus a *bond*, when assigned, must be delivered up to the assignee.³ But, in the case of mere *book-debts*, there is nothing that can be delivered; except, indeed, when one partner assigns all his share in the partnership debts to the other, in which case the deed of co-partnership must be delivered up. And whenever a debt is assigned, *notice* of the assignment must be given to the debtor, or the party from whom the assignor was to have received the money,⁴ whether there is a security for the debt or not;⁵ for otherwise the obligee, in the case of the bond, or indeed any other assigning creditor, would be enabled to obtain payment of the debt,—which is tantamount to leaving it in his order and disposition. Therefore, in the event of a dissolution of partnership, notice in the *Gazette* of such dissolution has been held not sufficient notice to the partnership debtors, unless it could be reasonably inferred that they had seen it.⁶

Where a warrant of attorney was deposited with a

¹ *Nanton v. Moore*, 7 T. R. 67.

² Per Sir W. Grant, *Jones v. Gibbon*, 9 Ves. 410.

³ *Ryal v. Rowles*, 1 Ves. 348. 1 Atk. 171.

⁴ *Gardner v. Lachlan*, 4 Myl. & C. 129.

⁵ *Ibid.* Ex parte *Monro*, Buck, 7. Ex parte *Burton*, 1 G. & J.

207; and see ex parte *South*, 3 Swanst. 393. Ex parte *Alderson*, 1 Mad. 53. *Buck v. Lee*, 3 Nev. & M. 580. Ex parte *M'Turk*, 2 Dea. 58.

⁶ Ex parte *Osborne*, 1 G. & J. 356. And see *Dean v. James*, 1 Nev. & M. 392.

creditor to secure the payment of a debt, and the transaction took place through the agency of the solicitor attesting the execution of the warrant of attorney; it was held that the interposition of the solicitor in the transaction did not dispense with the necessity of notice of the party who had executed the warrant of attorney, so as to take that security out of the reputed ownership of the depositor; and although the warrant of attorney was executed for the purpose of securing a sum primarily secured by a bill of exchange, yet this did not supersede the necessity of notice as to the warrant of attorney.¹ A deposit, however, of a bill of exchange, though not indorsed, is good, without notice.²

Assignment of freight.] Where A., a ship-owner, assigned to B. the *freight* earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage, the outward freight being paid to A. before the ship sailed; and the charter-party was afterwards delivered to B. by A.'s direction, and B. gave notice of the assignment to C., after which A. became bankrupt before the arrival of the ship; it was held that the homeward freight was not in A.'s order and disposition at his bankruptcy, but that B. was entitled to it.³

So, where A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on behalf of the owner, a certain sum for the freight by two instalments, one to be paid on the sailing of the ship, and the other on the completion of the voyage; and the owner, being indebted to C., ordered in writing A. to pay to C. all monies he might receive under the charter-party, and A. accordingly paid over the first instalment to C., after which the owner assigned by deed the remainder of the freight to C., who gave notice of the assignment to A., but not to B., and the vessel afterwards completed her voyage, and the owner became bankrupt; it was held that the remainder of the freight was not in his order and disposition at the time of his bankruptcy,⁴ and that the only person to whom it was necessary to give notice of the assignment of the freight was A., from whom C. was to have received the payment of it.⁵

¹ *Ex parte Price*, 3 M. D. & D. 586. *Leslie v. Guthrie*, 1 Bing. & C. 697. 1 Scott, 683.

² *Ibid.*

³ *Douglas v. Russell*, 4 Sim. 524. ⁴ *Gardner v. Lachlan*, 6 Sim. 407. 8 Sim. 123.

⁵ *Id.* 4 Myl. & C. 129.

Policy of insurance—notice to the office.] With respect to the transfer or deposit of a policy of assurance, it is difficult to reconcile the decisions of the courts of equity and common law. It has been held in equity, that if a trader effect a policy of insurance on his life, and assign it to a creditor, who does not give notice to the insurance office, the interest on the policy passes to the trader's assignees upon his bankruptcy, although the office neither required notice to be given, to give effect to the validity of the assignment, nor recognised such notice when given;¹ and notwithstanding, also, the attorney of the creditor caused a memorandum to be entered at the insurance office directing that all letters were to be sent to such attorney, and the premiums were thenceforth paid by the creditor, through the hands of the attorney, but the office was not informed on whose behalf the attorney acted.²

It has been decided also in bankruptcy, that where the mortgagee of a policy created an equitable sub-mortgage of it, and no notice of the original mortgage, nor of the sub-mortgage, was given to the office, it was held that the sub-mortgage was invalid, and passed to the assignees of the mortgagee; although it was contended in this case, that the mortgagee, not having himself given notice to the office, could not be considered as the reputed owner of the policy.³

And where a party to whom a policy was assigned sent an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks, told him of the policy having been so assigned, this was not sufficient notice to the insurance office.⁴

But where the bankrupt was himself one of the directors of the office, and deposited a policy with his bankers, one of whom was also one of the auditors of the office, this was held to be sufficient notice.⁵ And a letter to the secretary of an insurance office, in which the writer says, "I am holder of the undermentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment.⁶

The *onus*, however, does not lie on the mortgagee, to show

¹ *Williams v. Thorp*, 2 Sim. 259. Ex parte *Colvill*, Mont. 110. Ex parte *Tennyson*, 1 Mont. & B. 67.

² *West v. Reid*, 2 Hare, 249.

³ Ex parte *Wood*, 3 M. D. & D. 315.

⁴ Ex parte *Carbin*, 4 D. & G. 364.

⁵ Ex parte *Waithman*, 4 D. & C. 364.

⁶ Ex parte *Stright*, Mont. 502. 2 D. & C. 314.

that notice was given to the office, but with the assignees, to show that it was not.¹ But this distinction has been taken both in equity and in bankruptcy,—that where all the insured (as in the equitable assurance office) are partners in the society, in that case there is no need to give express notice of the assignment of a policy to the office.²

It has been determined, however, at law, that the question whether the bankrupt was the reputed owner of the policy, does not depend upon a mere formal notice of the transfer being given to the insurance office, but is a question of fact depending upon a consideration of all the circumstances attending the possession, as is exemplified in the following case. In an action of trover by assignees for a policy of insurance, it appeared on the trial, that in 1836 the policy had been deposited by the bankrupt with the defendants, as a security for a debt; that in March, 1837, A. became embarrassed, and a meeting of his creditors was called, when a list of his debts was read aloud and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum, 1200*l.* (the estimated value of the policy) was deducted, leaving the defendants creditors for the balance of 1800*l.*; that on the 15th July, 1837, (the fiat being issued on the 27th) an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, at the same time stating that the policy had been deposited with the defendants; that the insurance office kept a book, for the purpose of entering written notices of assignments and deposits of policies, which book contained no such entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice. The judge directed the jury, that the defendants had not got rid of the apparent ownership of the bankrupt by what passed at the meeting of the creditors, and by the conversation at the office, such conversation not being followed up by a notice in writing; and the court of Common Pleas, upon a motion for a new trial, held that such direction was wrong; it being a question for the jury, whether, under all the circumstances, the bankrupt was the reputed owner of the policy at the time of his bankruptcy.³ In another case, also, it was held that the assignees cannot

¹ *Ex parte Stevens*, 4 D. & C. 117. & D. 131. But see *ex parte Arkwright*, 3 M. D. & D. 129.

² *Duncan v. Chamberlayne*, 11 Sim. 123. *Ex parte Rose*, 2 M. D. 962. ³ *Edwards v. Scott*, 1 Man. & G. 266. 2 Scott, N. R. 266.

recover in trover a policy of assurance deposited by the bankrupt before his bankruptcy as a security for money advanced; on the ground that it could not be considered in the order and disposition of the bankrupt, with the consent of the true owner.¹

In conformity with these decisions at law, it has also been held in bankruptcy, that the want of notice to the insurance office is not conclusive evidence of the policy being in the reputed ownership of the bankrupt, and that some positive evidence of such reputed ownership is necessary to bring the case within the 72nd section.²

If, however, the transferee of a policy or shares in an insurance company give due notice to the company of the transfer, it is not because the original shareholder continues to act as a director, or because the rules of the company have not been observed in regard to the mode of transfer, that the shares are to be considered as remaining in his order and disposition.³

Where the bankrupt assigned to S., by way of security for advances, certain stock standing in the names of three trustees; and S. in the course of a conversation with one of the trustees, and without any view of giving validity to the security he held, told him that he held the assignment as a security for his advances; it was held that this statement (although not made to the acting trustee) sufficed to prevent the stock from being in the order and disposition of the bankrupt at the time of his bankruptcy.⁴

And if a mortgagee be himself the trustee, to whom notice is requisite, the transaction itself is notice enough to prevent reputed ownership.⁵

Where a bankrupt deposited with a creditor, by way of equitable mortgage, an assignment which had been made to the bankrupt of a reversionary interest under a will, it was held that although no notice of the assignment was given to the executors either by the bankrupt or by the creditors, the property was not within the order and disposition of the bankrupt as reputed owner.⁶

Where the bankrupt (upon borrowing a sum of money) drew an order, in favour of the lender, for payment of the

¹ *Gibson v. Overbury*, 7 Mee. & W. 555.

² *Ex parte Cooper*, 2 M. D. & D. 1. *Ex parte Heathcote*, Id. 711. *Ex parte Rose*, Id. 131. *Ex parte Roley*, Id. 505.

³ *Ex parte Masterman*, 4 D. & C. 751.

⁴ *Smith v. Smith*, 4 Tyr. 52. 2 Cr. & M. 231.

⁵ *Ex parte Smart*, 2 M. & A. 60.

⁶ *Ex parte Newton*, 4 D. & C. 138.

money out of a particular fund due and to become due to him, and the order was deposited by the payee with the person on whom it was drawn; it was held, in this case, that the money did not pass to the assignees, but was to be appropriated to the payment of the order.¹

But the possession of a *carrier*, by whom the bankrupt sends money or goods to a creditor, does not alter the property, the possession of the carrier being in this respect the possession of the bankrupt. Therefore, where the bankrupt shortly before his bankruptcy drew a bill, and, after procuring it to be discounted, gave a creditor an order to receive the amount, which he directed A. (who discounted the bill) to transmit to the creditor; and whilst the money was in the hands of the carrier, the bankrupt committed the act of bankruptcy; the creditor, who afterwards received the money, was held liable to refund it to the assignees.²

An *accommodation acceptance*, in the hands of the drawer at the time of his bankruptcy, does not pass to his assignees; and may, therefore, be indorsed by him after he had committed the act of bankruptcy.³

Possession of bankrupt under a second fiat.] Where a bankrupt bought his own stock-in-trade of his assignees, and sureties joined in a security to them for the consideration, and the bankrupt continued to trade for four years afterwards, and then died, without having obtained his certificate, having contracted fresh debts subsequent to his bankruptcy,—Lord Camden held that the subsequent creditors were to be preferred to the creditors under the commission.⁴ But Lord Eldon, in observing upon this case, said, that it had never been considered of very high authority; for that, unless the bankrupt had purchased the stock with the money of a third person, it was purchased with that which was the property of the assignees, and in that case the sale would have been without consideration.⁵ And where a bankrupt (who had obtained his certificate) was employed by the assignees as their agent, in getting in the debts, and was permitted by them to remain in possession of his furniture, household goods, and plate, and to continue to inhabit his house for nearly five years, in order the better to assist the assignees in settling his affairs, during which

¹ *Row v. Dawson*, 1 Ves. 331.

² *Harvey v. Liddiard*, 1 Star. 123.

³ *Wallace v. Hardacre*, 1 Camp.

⁴ *Willis v. Freeman*, 12 East, 656.

⁵ *Troughton v. Gitley*, Amb. 630.

⁶ *Ex parte Martin*, 15 Ves. 116.

time he engaged in trade on his own account; but in all the statements of his estate and effects, which were laid before his creditors at different periods, the furniture, &c. (which had been inventoried and valued immediately after the commission issued) was included; a second commission having issued against him, the question was, whether his possession under these circumstances was not such as entitled the assignees under the second commission to the goods, as being in his order and disposition as reputed owner; and the court of King's Bench held that it was not.¹

But where a bankrupt had, between the time of obtaining his certificate under a second commission and the issuing of a subsequent fiat, carried on business to a considerable extent, and was possessed of property which might at any time have been made available in satisfaction of the debts proved under the second commission; it was held that such after-acquired property was in his possession as reputed owner, and was such as a third fiat might operate upon by virtue of the 72nd section of the 6 Geo. 4, c. 16,² and that the assignees under the third fiat could not be called upon to deliver up the assets collected by them to the assignees under the second commission,³ the former having on principles of equity the preferable claim to the property thus subsequently acquired. And it has been held, also, that such principles of equity apply as well to real as to personal estate, notwithstanding the 72nd section only applies to personal estate.⁴

Where an uncertificated bankrupt hired a shop, and carried on business there for some time, living with his son, and goods were supplied in the name, and on the credit, of the son,—although, in one or two instances, the father had guaranteed the payment,—it was held that the goods under these circumstances did not belong to the assignees.⁵ And wherever goods, with the consent of the true owner, come to the possession of the bankrupt *after he becomes bankrupt*, they do not vest in the assignees under the above provision as to reputed ownership; and a person “becomes a bankrupt” on *committing the act of bankruptcy*, which is followed up by a commission.⁶

¹ *Walker v. Burnell*, Doug. 317.

² *Butler v. Hobson*, 5 Scott, 824.

³ 4 Bing. N. C. 290. *Benjamin v. Belcher*, 11 Ad. & E. 250.

⁴ *Ex parte Jungmichel*, 2 M. D. & D. 471.

⁵ *Ex parte Butler*, 2 M. D. & D. 731.

⁶ *Davis v. Living*, 1 Holt, 275; and see *Stafford v. Clark*, 1 Carr. 24.

⁷ *Lyon v. Weldon*, 2 Bing. 334.

Property for a specific purpose.] So, in every case, the bare possession of goods entrusted to the bankrupt for a *specific purpose*, without any power given him to dispose of them, is not sufficient to make it a case of reputed ownership,—unless, indeed, the owner has been guilty of *laches*, in permitting them to remain so long in the bankrupt's possession, or under such circumstances as to give him a reputed ownership, and thus enable him to gain a false credit.¹ Therefore, a *carpenter* who receives timber to convert into a waggon, or a *tailor* to whom cloth is delivered to be worked up into clothes, have neither of them such a possession of the timber or the cloth as will constitute him a *reputed owner* of it within the meaning of the statute.² And even if money be left with a bankrupt, for a *particular purpose*, provided it be kept apart from his general property, that also cannot be claimed by his assignees; as in the case of an *overseer of the poor*, who kept the money received by him in that capacity distinct from his other effects.³ And where a friend agreed to lend a bankrupt 200*l.*, to be applied to a *specific purpose*, and placed in his hands a check on his bankers for that amount, and the bankruptcy took place before the check was paid,—it was held, that the assignees had no right to the check.⁴ So, where a merchant bought and shipped timber in his own name to one of the King's yards, where it was delivered for the use of the bankrupt (a carpenter), who had contracted to perform some works there, and who was secretly an agent of the merchant; it was held, that, as the timber was delivered only for the *purposes of the contract*, and as there was no sale of it to the bankrupt, the real *property* was in the merchant; and that, as there was no fraud in the transaction, the bankrupt's assignees were not entitled to it; for though the bankrupt had the *apparent*, he had not the *absolute* disposition of it.⁵

So where the bankrupt, having a contract with the Ordnance board for the delivery of a certain quantity of candles, and, being unable to complete the contract, applied to the petitioner to assist him by delivering a part of the quantity contracted for, which the petitioner agreed to do, provided the candles were delivered in the party's own name; and the bankrupt accordingly made out a bill of parcels in the petitioner's name, and sent his own waggons for the purpose of delivering the candles at the Ordnance depôt; and

¹ *West v. Ship*, 1 Ves. 243.

² *Per Ashurst J.*, 3 T. R. 323.

³ *Rex v. Egginton*, 1 T. R. 370.

⁴ *Moore v. Barthrop*, 1 B. & C. 5.

⁵ *Collins v. Forbes*, 3 T. R. 316;

but see 7 T. R. 237, per Lawrence, J.

the official assignee, after the bankruptcy, received from the Ordnance board the price of the candles which had been furnished by the petitioner; it was held that he was bound to refund it to the petitioner.¹

But where A. was in the habit of sending skins to B.'s tan-yard to be dressed, with an account as of a sale of each parcel of skins to B., who rendered an account of the dressed leather as sold by him to A.,—which mode of dealing was only practised by B. with A., nor was he in the habit of dressing skins for other persons;—it was held that a quantity of these skins, which were mixed with B.'s general stock at the time of his bankruptcy, passed to his assignees, on the principle of reputed ownership.²

Chattels let to hire.] Where utensils or chattels are let to a man for the purpose of carrying on his trade, and the transaction is *bond fide*, without any evidence of reputed ownership, then they cannot be claimed by the assignees. Therefore, where an inn-keeper ordered a post-chaise of his coachmaker, who lent him an old chaise till the new chaise was ready, and his name was not painted on the old chaise, it was held that it did not pass to his assignees.³ So, where a horse-contractor let out a cart-horse on hire to the bankrupts, who had it in their possession a twelvemonth; it was held not to pass to their assignees.⁴

And the like in the case of an upholsterer letting out furniture to an hotel-keeper, where it is the custom for hotel-keepers to hire a portion of their furniture; but in this case, the question for the jury will be, whether the custom is so general as to raise a fair doubt and suspicion in the minds of persons trusting him, that the furniture, though in the possession, was not actually the *property* of the bankrupt.⁵

3. Possession as Factor,⁶ Broker, or Banker.

Factor.] The possession of goods by the bankrupt as *factor*, though he has the power of immediately selling or pledging⁷ them, and taking the money, is (for the benefit

¹ *Ex parte Carlon*, 4 D. & C. 120.

⁵ *Mullett v. Green*, 8 Car. & P.

328. ² *Ex parte Batten*, 3 D. & C.

382.

³ *Newport v. Hollings*, 3 C. & P.

⁶ And see post, "Lien."

223. ⁷ See 6 G. 4, c. 94, and 5 & 6

Vict. c. 39.

⁴ *Ex parte Wiggins*, 2 D. & C.

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of trade) held not such a possession as will constitute a case of reputed ownership; for his possession of the property is only under a bare authority to sell it for the principal, and to account to him for the proceeds. A factor, indeed, stands in the situation of a trustee with his principal; and whatever property he has in his possession *in that character* at the time of his bankruptcy, and which can be distinguished from his own, belongs to his principal, and does not pass by the assignment.¹ And even if the goods be sold and reduced into money, provided the money be in *separate bags*, or in other respects *distinguishable* from the rest of the factor's property,—as in the case of the overseer before mentioned,²—the principal, and not the assignees, will be entitled to it;³ for the *dictum*, that money has no *ear-mark*, must be understood to apply only in a case of an *undivided* and *undistinguished* mass of current money.⁴ So, if the factor receives notes or bills, instead of money, or buys other goods with the proceeds, the principal will be equally entitled to the bills, or the goods so bought;⁵ for the product of, or substitute for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be the very product, or substitute; and the right of the principal to reclaim it only ceases when the means of ascertainment fail. Thus where a factor, having money of his principal in his hands, bought South Sea stock for him, and took the stock in his own name, but entered it in his account-book, as bought for his principal, and afterwards became bankrupt; it was determined, that the stock was not liable to the bankruptcy.⁶

In like manner, where a factor was employed to *sell*, as well as to *buy* wines on commission, which were bought and sold in his own name, and part of the wines were in the dock warehouses standing in his name, and part formed one indiscriminate stock in his own cellar; it was held that the

¹ *Burdett v. Willett*, 2 Vern. 638. *L'Apostre v. Le Plaistrier*, cit. 1 P. Wms. 318. *Mace v. Cadell*, Cowp. 233. Ex parte *Dumas*, 2 Ves. 586. 1 Atk. 232. *Godfrey v. Furzo*, 3 P. Wms. 185. *Boddy v. Esdaile*, 1 Carr. 62. *Garrat v. Cullum*, B. N. P. 42; and see 6 G. 4, c. 94, s. 5.

² Ante, 426.

³ Per Lord Kenyon, *Tooke v.*

Hollingsworth, 5 T. R. 215. 1 T. R. 370. *Paul v. Bird*, 2 Atk. 621.

⁴ 3 M. & S. 575, per Lord Ellenborough.

⁵ Ex parte *Sayers*, 5 Ves. 169. *Whitcomb v. Jacob*, 1 Salk. 160. *Scott v. Surman*, Willes, 400. 1 Atk. 234.

⁶ Ex parte *Chions*, 3 P. Wms. 186.

assignees would be compelled to deliver up the wines to the party who employed the bankrupt as such factor.¹

So, where a foreign merchant remitted bills to his factor in London, with directions to sell them, and advised him of his intention to draw for the proceeds, and the factor sold the bills, but before the receipt of the purchase money became bankrupt, and dishonoured the merchant's drafts for the amount; it was held that the merchant, and not the factor's assignees, was entitled to the proceeds, notice that if the bills had been indorsed both by the merchant and the factor, and were sold by the factor in his own name.²

Where the bankrupt had been employed as a broker by the petitioners to sell a parcel of goods, and secretly agreed with the buyer to share the profit or loss of the transaction in lieu of brokerage, and part of the goods remained in the bankrupt's hands at the time of his bankruptcy; it was held that the transaction was fraudulent as against the petitioners, and the sale void, and that the assignees were bound to deliver up to the petitioners the remaining portion of the goods.³

The same rule prevails as to the right of a principal to reclaim *substituted property* from a *factor* or *broker*, notwithstanding such substituted property has been acquired *in fraud*, and *not in pursuance* of his trust; for an abuse of trust confers no greater rights on the party, nor on his assignees, who claim in privity with him. Therefore, where a draft for money was entrusted to a *broker* to buy exchequer bills for his principal, and the broker received the money, and misapplied it, by purchasing American stock and bullion, intending to abscond with it and go to America; and he did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the stock and the bullion; the principal was, in this case, held to be entitled to such securities and bullion, as against the assignees of the broker, who became bankrupt on the very day on which he so received and misapplied the money.⁴ And Lord Ellenborough in his judgment in this case said, that if the property, in its original state and form, was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any claim of

¹ *Ex parte Moldant*, 3 D. & C. 351.

² *Ex parte Pauli*, 3 Dea. 169.

³ *Ex parte Huish*, 4 Dea. 294.

⁴ *Taylor v. Plumer*, 3 M. & S. 562.

greater validity in respect to it, than they respectively had before such change.¹

The rights of the principal will not in any case be altered, although the factor acts under a *del credere* commission; for this does not deprive the principal of his remedy against the buyer, if there be no payment to the factor;² but if a factor conceal the name of his principal, and sell in his own name, the buyer has a right then to consider him as the principal, and will be entitled, in an action by the real owner for the price, to set off a debt due from the factor.³

If the goods have been sold by the factor, and are not paid for at the time of his bankruptcy, the principal should give notice to the purchaser⁴ not to pay the factor, or his assignees; and if the purchaser will do so in spite of such notice, he will then be liable to repay the money to the principal;⁵ or, if the assignees receive the money, the principal will be entitled to recover the amount from them.⁶

Banker.—Short bills.] Upon the same principle as that of the right to reclaim goods from a factor, is founded the right of a customer to re-possess himself of what are called *short bills*; that is, bills not due, in the hands of his *banker*. For if such bills, or notes, are sent to a banker, or indeed to any other agent, to be *specifically applied*, and he becomes bankrupt, without having parted with them, they do not pass to the assignees.⁷ But, if the bills are *indorsed* by the person who deposits them with the banker, and the latter disposes of them before his bankruptcy, though even contrary to good faith,—in that case, they cannot be recovered by the customer,⁸ but the proceeds of the bills can still be recovered from the banker's assignees.⁹

¹ 3 M. & S. 574.

² *Scrimshire v. Alderton*, 2 Str. 1182.

³ *George v. Claggett*, 7 T. R. 359. *Rabone v. Williams*, cit. ib. 360. *Bayley v. Morley*, ibid. *Stracey v. Deey*, ibid. 361; and see 6 G. 4, c. 94, s. 6.

⁴ See 6 Geo. 4, c. 94, s. 6.

⁵ *Scrimshire v. Alderton*, supra. *Escot v. Milward*, 1 C. B. L. 378. 7 T. R. 361, note (b.)

⁶ B. N. P. 42. *Scott v. Surman*, supra. Ex parte *Murray*, C. B. L. 379.

⁷ Ex parte *Dumas*, 1 Atk. 233. Ex parte *Oursell*, Amb. 297. 2 Ves.

586. Ex parte *Emery*, 2 Ves. 674.

Tooke v. Hollingworth, 5 T. R. 215.

2 H. B. 501. *Parke v. Eliason*,

1 East, 544. Ex parte *Sayers*,

5 Ves. 169. *Zinck v. Walker*, 2 Bl.

1154. Ex parte *Maddison*, 1 C. B.

L. 384. *Hassall v. Smithers*, 12 Ves.

119. Ex parte *Smith*, Buck, 355.

Ex parte *Aiken*, 2 Mad. 192. Ex

parte *Cotterell*, 3 Dea. 12. *Jombard v.*

Woollett, 2 Myl. & C. 389.

⁸ *Collins v. Martin*, 1 B. & P.

648. *Bolton v. Puller*, ibid. 539.

Ex parte *Pease*, 1 Rose, 238.

⁹ Ex parte *Edwards*, 2 M. D. & D.

625.

Thus, where short bills had been deposited with country bankers, who indorsed them to their agents in London, and the agents had a lien on them for advances to the country bankers; it was held, on the bankruptcy of the country bankers, that the proceeds of the bills, after satisfying the lien of the London bankers, ought to be distributed rateably among those persons who had deposited short bills with the bankrupts.¹

The nature of the interest, however, which the assignees of a banker possess in bills and notes remaining in his hands at the time of his bankruptcy, depends on the circumstances, under which the bills or notes have been remitted or paid in by his customer, as well as upon the state of accounts between the customer and the banker at the time of the bankruptcy. If the bills have been *discounted* with the banker, the property is then changed, and they pass to his assignees with the rest of the effects; or, if he has advanced money upon them, or accepted other bills for the accommodation of the customer, the assignees will not only have a lien upon all the negotiable securities in the banker's hands, to the amount of such advances or acceptances, but may also put the same in suit. And even where, taking into account the bills on both sides, the customer has a balance in his favour, but not equal to the amount of *any one* of the bills,—this surplus cannot be appropriated to any *one* bill, in reduction of the claim of the assignees suing any of the parties to such bill.² Where the transaction with a banker amounts to an exchange of acceptances, his assignees are in that case entitled to the bills so taken by him in exchange; as where a person, with whom a country banker has no previous dealings, applies to him for a bill on London, in return for bills of exchange of the *same amount*; in which case, though the bill given by the banker be dishonoured, yet the bills given in exchange will pass to his assignees.³

But where a customer agreed to pay into a bank (consisting of four partners) bills of exchange indorsed, and to take in return their promissory notes; and three of the four partners became bankrupt before the bills were paid in, or their notes taken, and after this was done, then the fourth became bankrupt; it was held in this case, that the assignees were not entitled to retain the bills so paid in; the

¹ *Ex parte Froggatt*, 3 M. D. & D. 322.

² *Horablower v. Proud*, 2 B. & A. 327.

³ *Bolland v. Bygrave*, 1 Ryan & M. 271.

consideration having failed upon which alone they were parted with.¹

Where a custom of exchanging acceptances existed between the bankrupt and other houses, through the agency of B., and notes were sent by the petitioner to B. for this purpose, but were never exchanged, having been stolen from B., and never having formed an item in any settlement of accounts between B. and the assignees; it was held that the petitioner could not recover the value of the notes from the assignees.² But where the bankrupt and the petitioners mutually exchanged their notes at stated times, and the bankrupt's agent having notes of the petitioners in his hands, the assignees allowed the agent to retain these notes in account with them, he having claims against the bankrupt; it was held that the petitioners could recover the value of these notes against the assignees.³

When bills are paid in generally, to be received when due, and then to be placed to the account of the customer, they must be given up by the assignees,—provided the cash account is in favour of the customer, and the banker's estate is not chargeable with any outstanding engagements on the customer's behalf. For it is perfectly clear, as a general rule, that if a customer pays bills into his banker's, although it gives him a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the *property* in the bills is not altered—they still remaining the property of the customer—although the banker may have a lien to the extent of his advances. In order to *change* the property, it must be shown that the banker bought the bills, or discounted them, which amounts to the same thing.⁴ And, though bankers may have authority from their customer to discount bills remitted by him, to a *certain amount*, or for certain purposes,—yet this will not give them an absolute authority to discount *all* bills, which may be paid in by the customer. Nor, indeed, will it make any material difference, that the special authority to discount is for an uncertain amount, and one which cannot well be ascertained at the time it is given; as, where the object is to provide a fund to honor the drafts or bills of the customer, or to reduce the cash balance, when the bankers should be in advance.⁵

¹ Ex parte *M'Gae*, 2 Rose, 376.

⁴ Per Holroyd, J., *Thompson v.*

² Ex parte *Watson*, 1 M. & A. 685.

Giles, 2 B. & C. 431.

³ Ex parte *Bank of Scotland*, 1 M. & A. 644. 4 D. & C. 32.

⁵ Ex parte *Wakefield Bank*, 1 Rose, 243. Ex parte *Leeds Bank*, *ibid.* 254.

So, where by the terms of an agreement between F. and Co., and their bankers S. and Co., the permission to discount indorsed bills of exchange was limited to an amount necessary to meet such acceptances of F. and Co., as were in the course of immediate payment at the house of S. and Co.; and, in order to cover certain acceptances becoming due, F. and Co. remitted to S. and Co. an indorsed bill of exchange, but their acceptances were dishonored by S. and Co., who soon afterwards stopped payment, and then procured the bill to be accepted, and made an entry in their books of their having discounted it; it was held, on the bankruptcy of S. and Co., that they had no right to discount the bill without executing the trust, and that their assignees were bound to deliver up the bill to F. and Co.¹

Bills not due, which are *entered short* in the banker's books, are always considered to be the property of the customer, and must be specifically returned to him, if the cash account is in his favour. And the same has been held, also, with regard to a bank post bill, which the customer sends to his bankers, with a letter desiring them to place it to his credit, and to send him a receipt.² But, if bills are paid in by the customer *as cash*, or are *entered as cash*, with his knowledge or consent, deducting the discount,—and he thereupon draws, or is entitled to draw upon the bankers, as having that credit in cash,—it has been decided by Lord Eldon, that the customer will be precluded from recurring to the bills specifically; and that such knowledge or concurrence, on the part of the customer, may be inferred from the usual mode of dealing between the parties,³ which mode of dealing may be also such, as to warrant the inference that the parties mutually considered and treated such bills *as cash*.⁴ But, notwithstanding the customer has permission to draw on the bankers to the amount of the bills paid in, yet, if they are entered as *bills* in the bankers' books,—and the cash balance, independently of the bills, is in favour of the customer at the time of the bankruptcy,—the customer has, in that case, a right to have all the bills remaining in specie delivered up to him by the assignees. And this, too, notwithstanding such bills were indorsed by the customer, unless it can be shown to have been his *intention* to make an

¹ *Ex parte Frere*, Mont. & M. 153. *Ex parte Pease*, *ibid.* 233. 263. 19 Ves. 25. *Ex parte Sollers*, *ibid.*

² *Ex parte Atkins*, 3 M. D. & D. 155. 18 Ves. 229.

103.

⁴ *Ex parte Thompson*, Mont. & M.

³ *Ex parte Sargeant*, 1 Rose, 102.

absolute transfer of them ; for the indorsement may be made merely, to enable the banker more effectually to receive the amount from the other parties on the bills, for the account of the customer.¹ Indorsement is, however, considered *prima facie* evidence of discount, unless the object of mere deposit is clearly shown.² If the object is a mere deposit, then it is a breach of faith for the banker to negotiate the bills, unless he is justified in so doing by the state of the customer's account.³ But (as Lord Eldon has observed in one of the cases upon this subject) it ought to be generally known, that if bills *indorsed* are remitted to bankers, they *may* dispose of them effectually—as between the subsequent holder and the remitter—though contrary to the faith of the understanding between the parties.⁴ But where such bills were indorsed by the customer, and indorsed also by his bankers, who remitted them to their agents in London to secure, in part, the advances made to them by the London house ; it was held by Lord Lyndhurst, that the customer had a right to claim the amount of such bills out of the proceeds of the securities deposited by the bankers with the London house, or out of such surplus as should remain after satisfying the lien of the London house, and that the bankers had no right to dispose of the bills in the way in which they applied them.⁵

In the cases which occurred in Boldero's bankruptcy, Lord Eldon is reported to have dwelt much on the distinction between a *general*, and a *limited*, authority to discount ; and the bearing of his opinion seems to be, that if bankers have a *general* authority to discount, the customer in that case would have no right to have the bills delivered up ; and he is of the same opinion, also, (as has been already observed,) when the bills are paid in *as cash*, and the customer is entitled to draw, as having that *credit in cash*, in which last case, it is conceived, the bankers would (as a matter of course) have, by legal inference, an authority to discount the bills so paid in. With great deference, however, it is submitted, that there is no solid distinction in law, whether the banker has a *general*, or a *contracted* authority in this respect, as far as regards the right of the customer to reclaim bills remaining in specie in the banker's hands. The principle, which governs

¹ *Thompson v. Giles*, 2 B. & C. 422. *Ex parte Benson*, 1 D. & C. 435.

² *Ex parte Towgood*, 19 Ves. 229 ; and see 2 B. & C. 429.

³ *Per Bayley J.*, 2 B. & C. 409.

⁴ *Ex parte Pease*, 1 Rose, 238, 246. *Collins v. Martin*, 1 B. & P. 648. *Ibid.* 546.

⁵ *Ex parte Armistead*, 2 G. & J. 371. *S. P. Ex parte Benson*, 1 D. & C. 435.

nearly all the cases on this subject, is, that in questions *between a banker and his customer* (though not as between the customer and third persons), the banker is considered precisely in the situation of a *factor*,¹ and has only a lien upon the securities in his hands for his general balance. If the factor has converted the goods of his principal into money, or the banker has negotiated (even contrary to good faith) his customer's securities, and turned them into cash; then, as money has, generally speaking, no ear-mark to distinguish it from the common stock, neither the principal in the first case, nor the customer in the last, can have a specific claim for such money against the assignees either of the factor, or the banker, in the event of his bankruptcy. But, unless the property is *actually changed*, either by discounting² the bills with the banker, or by the banker himself negotiating them, —it is apprehended, that in whatever way they may have been paid in, or whether the banker had a general, or only a limited, authority to discount, his assignees can have nothing more than a lien for his general balance, if the bills *remain in specie* in his hands at the time of his bankruptcy; and that the customer (if the cash account is in his favour³) has a right to have the bills delivered up, upon his indemnifying the estate against any outstanding acceptances⁴ of the banker for his own accommodation.

In one case it has been determined, that when bills were specially indorsed by the customer to receive the amount when due, and the bankers had paid them away, the customer was entitled to have the value refunded by the assignees, although the bankers charged discount on the bills, and the customer might have drawn on them for the amount; but in that case, the balance of the customer's account with the bankers' was in her favour, exclusive of the amount of the bills, and continued so up to the bankruptcy of the bankers.⁵

But though a *customer* has a right to have short bills delivered up to him, if the account is in his favour,—yet the *holders* of the banker's *outstanding acceptances* in favour of the customer have no such right, notwithstanding the short bills may have been expressly deposited to answer

¹ *Collins v. Martin*, 1 Bos. & P. 651. *Thompson v. Giles*, supra. *Bolton v. Fuller*, supra.

² *Carstairs v. Bates*, 3 Camp. 301.

³ And see *Giles v. Perkins*, 9 East, 12.

⁴ *Ex parte Buchanan*, 1 Rose, 280. 19 Ves. 201. *Ex parte Rowton*, 1 Rose, 15. 17 Ves. 426; and see per Holroyd J., 2 B. & C. 431.

⁵ *Ex parte Bond*, 1 M. D. & D. 10.

such acceptances. For these bill-holders, being no parties to any contract between the customer and the banker, can have no lien even in equity upon such short bills; the object of depositing which was, not for the security of the persons in whose hands the banker's acceptances might be, but for the security of the banker himself, who became liable on them. But, as the liability of the banker's estate, in respect of such outstanding acceptances, must be exonerated, before any restitution of the short bills can be claimed by the customer,—if the customer, therefore, should also become bankrupt, then *his* assignees are bound to leave the banker's estate in the same condition as the customer must have done himself. And, as the holders of the outstanding acceptances are, in this predicament, entitled to be paid out of the produce of such short bills, though not possessing a direct lien upon them, such an arrangement of the property will be ordered between the two estates of the banker and the customer, as may indirectly render the claim of the bill-holders available.¹ Upon this principle, where an American house remitted to a London house certificates of American bank shares to be applied in payment of certain outstanding bills drawn by the American upon the London house, and both houses became bankrupt, it was held that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills.² When bankers, however, before their bankruptcy have received out of the produce of part of the short bills, a sum of money more than sufficient to satisfy all their outstanding acceptances for the customer,—their assignees will, then, have no right to retain the remaining short bills to satisfy such acceptances; and, consequently, the holders of the latter will, in this case, have no greater right to be paid out of the produce of the remaining short bills. But, though the bankers may have been in cash sufficient to pay these acceptances, there may still be such a state of accounts between them and their customer, as will give them a lien upon the remaining bills; and, in order to ascertain this state of account, the lord chancellor has (on the petition of the bill-holders) referred it to the master, to inquire, whether the bankers had, at the time of their bankruptcy, any lien upon the remaining short bills in their hands.³

¹ Ex parte *Waring*, ex parte *Inglish*, 2 Rose, 182. 19 Ves. 345.
2 G. & J. 404.

² Ex parte *Brown*, 3 Dea. 91.

³ Ex parte *Parr*, Buck, 191.

If a banker on the day of his bankruptcy hands over short bills to a third person, who receives the amount from the acceptors, and pays over the proceeds to the assignees, they are liable to refund the amount to the customer in an action for money had and received.¹ And where a London banker, having a branch bank at Edinburgh, stopped payment on the 2nd January, and wrote to his agent there apprising him of the fact, and directing the business of the branch bank to be discontinued; and on the 4th January, before this notice reached the agent, a customer paid into the branch bank 305*l.* in notes and cash, to be remitted to the house in London, but after the news reached Edinburgh, and whilst the notes were still in the agent's possession, gave him notice not to part with them, and they remained in his hands on the 26th January, when a fiat issued against the banker in London; and the agent having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* in part satisfaction of his lien: it was held that the assignees were bound to refund this sum to the customer.²

And where the petitioner sent 450*l.* to the agent of a banker, to retire a note of the petitioner's, which was not done, as the banker became bankrupt, and the assignees allowed the agent to retain this sum in part satisfaction of a claim which he had against the banker; it was held that the petitioner was entitled to recover the 450*l.* from the assignees.³

Where a debenture for a tontine annuity was deposited by a party with his bankers, one of whom received the dividends and placed them to the credit of his account, it was held, on the bankruptcy of the bankers, that the debenture was not in their order and disposition, having been deposited in the nature of a trust.⁴

Where, by the mode of dealing of a banking-house, money paid in after banking hours was put into a separate place of deposit, and entered in a counter-book, but was not carried to the customer's account until the next day; and a customer paid in a bank note after the banking hours, and the banker (having before resolved not to open his bank again) placed the note in such separate place of deposit, without carrying it to the account of the customer, and next morn-

¹ *Tennant v. Strachan*, Mood. *Ex parte Solomon*, Id. 77. *Ex parte Wylic*, Id. 82.

² *Ex parte Cunningham*, 3 D. & C. 58. *Ex parte Belcher*, Id. 87.

³ *Ex parte Simpson*, 1 Dea. 47.

⁴ *Ex parte Douglas*, 3 D. & C. 310.

ing stopped payment and became bankrupt, the bank note was held to remain the property of the customer.¹

V., a customer of the banking-house of D. and Co., transfers to N. (a partner in the firm) certain stock by way of security for money borrowed of them, and gives also notes for the amount, payable on the stock being re-transferred to him. He pays off these notes; and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred (being blended with other stock, of which N. was in like manner possessed by way of security for other customers) is sold by the partnership, except a small balance still remaining in the name of N. It was held, under these circumstances, that (the other creditors in respect of stock having been satisfied their demands) V. was entitled to the whole of this balance, as being sufficiently appropriated by the bankers to answer *pro tanto* the stock originally transferred by N.²

Where a London firm advanced money to a merchant, who was about to make a consignment to their correspondents in Calcutta, and they took as a security the bill of lading, which they sent to their correspondents, with an account of the transaction, and a direction for the latter to remit the return proceeds to the merchant through them; and the correspondents, after selling the goods, remitted directly to the merchant a bill of exchange drawn upon the London firm for the full amount of the proceeds, in the following form: "Pay through your good selves," &c.; and the bill was received by the assignees of the merchant, who became bankrupt before its arrival; it was held that they were bound to give it up, on being paid the difference between the proceeds of the sale and the advance made to the bankrupt, and that the London and Indian firms might properly join in presenting a petition to have the bill delivered up.³

An order may be applied for to have short bills delivered up by the official assignees, before the assignees are chosen by the creditors.⁴

Savings banks.] By the 3 & 4 Will. 4, c. 14, s. 28, if any person appointed to any office in a *savings bank*, or in any society established by that act, and being entrusted with the

¹ *Sadler v. Belcher*, 2 Mood. & R. 489.

² *Vulliamy v. Noble*, 3 Meriv. 593.

³ *Ex parte Mackey*, 2 M. D. & D.

136.

⁴ See *ex parte Buchanan*, 1 Rose, 280. 19 Ves. 201. *Ex parte Burton Bank*, 2 Rose, 162.

keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any monies or effects belonging to such savings banks or society, or any deeds or securities relating to the same, shall (among other things therein specified) become a bankrupt or insolvent, his assignees are required, within forty days after demand made by two of the trustees of the bank, to deliver and pay over all such monies and other things to such person as the trustees shall appoint, and to pay out of the effects of such bankrupt all sums of money remaining due, which the bankrupt received by virtue of his office, before any other of his debts are paid.

And by the 4 & 5 Will. 4, c. 40, s. 12, a similar provision is made with respect to *friendly societies*.

In the first cases that were determined under a former act relating to friendly societies, the above provision was construed to extend to *all persons*, who had the property of the society in their hands, although they were *not officers* of the society;¹ but upon a revision of those cases, such a construction was found to be too large, and the enactment was afterwards confined to cases where persons were duly and formally appointed *officers* of the society, and was therefore held not to extend to a person, to whom the money of the society had been paid as a banker,² or to whom money had been lent by them upon security paying interest.³ And even *money lent to a treasurer* duly appointed, upon his promissory note, has been held to be not within the operation of the act; for the preference is given by the statute, in respect of money which gets into the hands of the *officers* of the society, only *by virtue of their office*, and independently of contract.⁴ But, in a case where money was paid to trustees, *as trustees*, and they gave separate notes for it, and voluntarily agreed to pay interest, for the purpose of serving the society,—it was held, that here, the money being paid to them *as trustees* duly appointed, their agreeing to pay interest did not alter the case, so as to make the money in their hands to be considered only a loan to them in their private character; and the claim under the statute was allowed.⁵

¹ 1 C. B. L. 255.

² Ex parte *Whipham*, 3 M. D. & D. 564.

³ Ex parte *Ashwith*, 1 C. B. L. 255. Ex parte *Amicable Society of Lancaster*, 6 Ves. 98. Ex parte

Ashley, *ibid.* 441. Ex parte *Corser*, *ibid.* Ex parte *Ross*, *ibid.* 804.

⁴ Ex parte *Stamford Friendly Society*, 15 Ves. 280. Ex parte *Buckland*, Buck, 214.

⁵ Ex parte *Friendly Society of Wickwar*, *Whitmarsh*, 297.

So where, on the appointment of the bankrupt as treasurer of a friendly society, it was agreed that of the funds then in hand, she was to pay interest for 120*l.*; it was held that this was not to be considered as a loan to her, but that it was in her hands and possession by virtue of her office of treasurer, within the meaning of the 4 & 5 Will. 4, c. 40, s. 12, and that the assignees were bound to pay over the amount to the society.¹ And where the treasurer of a friendly society, having a debt due to him from a person who offered a security, took a security in the name of the society, and retained the amount of his debt out of the society's monies in his hands, and some time afterwards became a bankrupt, having in the meanwhile debited himself annually in his accounts with the society with the interest of the amount for which the security was taken; and the security proved insufficient, and was not of the description, or taken in the manner, required by the Friendly Society's Act; it was held that the omission on the part of the society to take steps for setting aside the transaction, and calling in the money before the bankruptcy, did not deprive them of their statutory right to be paid in full, before the other creditors.²

Where the treasurer of a savings bank on his appointment entered into the usual bond for performance of his duties, but did not receive any money, the deposits being paid by the managers directly to a banking firm of which the treasurer was a partner, to the credit of the trustees of the savings bank, who were allowed interest upon it; but he nevertheless signed the return (as required by the act) to the commissioners for the reduction of the national debt; and thereby acknowledged the amount of the balance, standing to the credit of the trustees, to be monies in his hands as treasurer; and the firm became bankrupt; it was held that the balance was in the hands of the partner, *as treasurer*, and might be recovered in full by the savings bank.³

Where a joint fiat issues against the treasurer of a savings bank and his co-partner in trade, the trustees can (under the 3 Will. 4, c. 14, s. 28,) claim only a priority of payment of any debt owing by him, out of his separate estate, and have no claim whatever against the joint estate, although the separate estate may prove insufficient to satisfy the debt;

¹ *Ex parte Roy*, 3 Dea. 537.

³ *Ex parte Riddell*, 3 M. D. &

² *Ex parte Burge*, 1 M. D. & D. D. 80.

and if they advance such a claim by their petition, they will be refused their costs of obtaining the order against the separate estate.¹

4. Possession as Trustee, Executor, or Administrator.

Trust property.] Where the bankrupt is a *trustee*, and at the time of his bankruptcy has any property belonging to his *cestui que trust* in his possession, which can be distinguished from the mass of his own property, it does not in this case pass to his assignees; for any presumption of reputed ownership, arising from the fact of possession, is rebutted by the circumstance of the trust. Formerly, when a trustee, or executor, became bankrupt, it was the practice, upon the application of the *cestui que trusts*, or other parties interested, to appoint a receiver of the trust property, the better to secure the effects for the purposes of the trust.² But now, by 6 Geo. 4, c. 16, s. 79, it is enacted, that if any bankrupt shall, *as trustee*, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate,³ or any interest secured upon or arising out of the same; or shall have standing in his name *as trustee*, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland; the lord chancellor, on the petition of the persons entitled in possession to the receipt of the rents or dividends, on due notice given to all other persons (if any) interested therein, may order the assignees and all persons whose act or consent thereto is necessary, to convey, assign, or transfer such estate, interest, &c. to such person or persons as the lord chancellor shall think fit, upon the same trust as such estate, &c. were subject to before the bankruptcy; and also to receive and pay over the rents as he shall direct.⁴

It has been held, that stock, standing in the name of the bankrupt in trust for other persons, does not pass to the assignees, under the 72nd section of the above statute,

¹ *Ex parte Appach*, 1 M. D. & D. 83.

² *Ex parte Ellis*, 1 Atk. 101.
Ex parte Llewellyn, 1 C. B. L. 137.
Langley v. Hawke, 5 Mad. 46.

³ *Quære*, whether this provision was necessary, as assignees were

never considered entitled in any way to trust estates?

⁴ This section is an extension of the 36 Geo. 3, c. 90, s. 1, which was confined to *government stock*, standing in the name of the bankrupt.

although it is not entered in the name of the bankrupt, as trustee, in the bank books.¹

So, where trust funds were invested in the purchase of transferable shares in a banking company in the name of one of the trustees, who executed a declaration of the trusts thereof,—the rules of the company not allowing shares to stand in the names of joint owners or *cestui que trusts*; and the trustee was also a proprietor of shares in his own right, and there was nothing to distinguish which were the individual shares held by the different proprietors; and the trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him, and afterwards became bankrupt,—it was held that the trustee must be presumed to have pledged only such shares as belonged to himself, and not the shares of his *cestui que trusts*; and that they were therefore entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy, as could be presumed to be identical with the number of shares in which the trust funds were invested; and that the equitable title of the *cestui que trusts* to the shares purchased with the trust funds was perfected, without notice to the banking company of the execution of the declaration of trust.²

Where the bankrupt was entitled to a reversionary interest under a will, and had misapplied monies which had come to his hands as trustee under the same will, his reversionary interest was ordered to be sold, and the proceeds applied in making good the monies which he had misapplied.³

There are many cases, also, which have decided, that trust property of any description does not pass to the assignees of a bankrupt trustee. Thus, where a bill of sale was made to the bankrupt of certain leases and other property, in trust to pay the debts of the assignor, the possession of such property by the bankrupt was held not to be a case of reputed ownership.⁴ So, where a bankrupt had shares in a trading company, in trust for W., who by his will appointed the bankrupt his residuary legatee, Lord Redesdale held, that the shares were not left in the bankrupt's possession, so as to entitle his assignees absolutely to them; but that they were subject to the debts and legacies

¹ Ex parte *Witham*, 1 M. D. & D. 624.

² *Pinkett v. Wright*, 2 Hare, 120.

³ Ex parte *Hardman*, 3 M. D. & D. 559.

⁴ *Copeman v. Gallant*, 1 P. Wms. 314.

of W.¹ And where a bankrupt, previous to his bankruptcy, assigned to B. for a valuable consideration a debt due from A. to the bankrupt,—the bankrupt was, in this case, held to be a trustee for B., and the debt not to pass under the commissioners' assignment.² So where a lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R.; and on the trial of an issue directed by the court, it was found that W.'s name was used in the first instance in trust for R.; it was held that the lease did not pass to W.'s assignees, and that the declaration of trust, though executed after the bankruptcy, was good in favour of R., within the statute of frauds.³ And where a testator directed, that in case his son should carry on his (testator's) trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside in his house, and have the use of the furniture; and the widow and son carried on the trade and became bankrupt; it was held, in this case, that the furniture, &c. was not in the order and disposition of the bankrupts, and did not pass to the assignee, as it was not in the exclusive possession of the widow, but only as connected with that of her children,—and, as it was also a possession connected with title, and dependant in the possession of the bankrupts upon the same trusts, as it would have been subject to, had it remained in that of the trustees of the testator.⁴

So, where A. assigned a leasehold house and furniture to B., upon trust for the use of A. for life, and after his decease, for the use of C. his wife for life, and after the decease of the survivor, for the use of their daughter, D.; and after A.'s death, C. his widow, married E., who immediately took possession of the house and furniture, and continued in possession until October, 1828, when he became bankrupt, having, however, some time previously, viz. in 1818, procured B., the trustee, to assign the house and furniture to him by a deed, which contained false recitals, and was in breach of the trust; it was held, on the petition of C. and D., that the furniture was not in the order and

¹ *Joy v. Campbell*, 1 Sch. & Lef. 328. S. P. *ex parte Watkins*, 1 M. & A. 689. 4 D. & C. 87.

³ *Gardner v. Rowe*, 2 Sim. & S. 346. 5 Russ. 258.

⁴ *Ex parte Martin*, 2 Rose, 331.

² *Winch v. Keeley*, 1 T. R. 619; and see *ex parte Byas*, 124. *Unwin v. Oliver*, 1 Burr. 481.

disposition of the bankrupt, and that his assignees should be restrained from selling the same.¹

So, where by the terms of a settlement made previous to the bankrupt's marriage, all the property of his intended wife was vested in trustees for her separate use, and she was to have all the rights and privileges of a *feme sole*, the property consisting of an hotel and furniture at Brighton, the business of which was conducted entirely by the wife, the bankrupt never living at the hotel, nor in any way interfering in the management of it; it was held that this property was not in the reputed ownership of the bankrupt.²

But, where A. assigned 800*l.* to trustees, in trust during the life of B., or such part thereof as they should think proper, or at such times and in such portions as they should judge expedient, to pay the interest to him,—or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have a right to the interest, other than the trustees in their uncontrolled discretion should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, dispositions or engagements; and it was declared that after his death the 800*l.*, and all savings and accumulations of interest, if any, should be in trust for his children; and the trustees paid him the interest down to his bankruptcy; it was held that his life interest in the 800*l.* passed to his assignees.³

But although property held in trust for the bankrupt will pass to his assignees, yet the court will not take the trust deed out of the possession of the bankrupt's trustees.⁴

M. and A. being consignees of a West India estate, and in that character becoming creditors to the estate, by deed long prior to their bankruptcy the estate was conveyed to trustees, (M. being one of them,) on trust to apply the proceeds to certain purposes, one of which was to pay off the debt due to M. and A. This debt was afterwards assigned by them to S. and Co. Prior to the bankruptcy of M. and A. they received ten hogsheads of sugar, which remained in the docks earmarked in their name, at the time of the bankruptcy. Shortly after their bankruptcy seventy-four hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads. It was held, that the sugars came to

¹ Ex parte *Horwood*, Mont. & M.
169. S. C. Mont. 24.

² Ex parte *Massey*, 4 D. & C. 405.

³ *Snowdon v. Dales*, 6 Sim. 524.

⁴ Ex parte *Holder*, 3 D. & C. 276.

the hands of M. and A. clothed with a trust to pay the proceeds to M., as trustee, and were not in the reputed ownership of M. and A., but must be applied to pay off the debt assigned to S. and Co., and in discharge of the other trusts of the deed; M., as trustee, being affected with notice to M. and A. of the assignment of their debt.¹

Where a testator devised freehold property to trustees, of whom the bankrupt was one, upon trust to sell and divide the proceeds among his brothers and sisters, including the bankrupt and his co-trustee; and the *cestui que trusts*, in consideration of a specific sum stated in the deed to be paid to each of them, but which in fact was not paid, conveyed the estate to the bankrupt, who gave each of them two promissory notes for the payment of the money by instalments, which were never paid; it was held that the *cestui que trusts* had a lien on the estate in the hands of the bankrupt's assignees for the money still remaining unpaid.²

Where a testator bequeathed the whole of his property to trustees for the payment of an annuity and other purposes, and the trustees became bankrupt, the trust fund must be set apart for the payment of the whole annuity, without regard to the interests of the persons entitled to the residue.³

Executors.] The same rule as in the case of a trustee, is also established where an *executor* or *administrator* become bankrupt; for the property he may possess in either of those capacities, still remains liable to those who have a right to follow the specific fund,⁴ although such fund consists of money, provided it can be *specifically distinguished* and ascertained to belong to the testator, and not to the bankrupt himself.⁵ And so, where real estates devolve upon the bankrupt as *heir*, a specialty creditor of the ancestor may follow the real assets, or their specific produce, in the hands of the assignees.⁶

Where part of the effects which came into the hands of an executor's assignees, on his bankruptcy, consisted of specific assets of the testator, and a suit in chancery was pending for the administration of the testator's estate; the proceeds of the assets were ordered by the court of review

¹ *Ex parte Smith, re Manning*, 4 D. & C. 579.

² *Ex parte Latcy*, 1 Dea. 557.

³ *Ex parte Rothwell*, 2 D. & C. 542.

⁴ *Ex parte Marsh*, 1 Atk. 159. *Ex parte Llewellyn*, 1 C. B. L. 137.

⁵ *Howard v. Jemmett*, 3 Burr. 1369, per Lord Mansfield.

⁶ *Ex parte Morton*, 5 Ves. 449.

to be retained and invested, although no accounts had been taken, the suit in chancery not having proceeded to a decree.¹

If the bankrupt is the husband of an executrix, the assignees in this case have no right to the testator's goods, which are left in the bankrupt's possession; for the wife being possessed of them *in auter droit*, the husband can have them in no better right;² and the same with respect to a bond debt due to her as executrix.³ So, where the wife of a bankrupt administered to her father, and became possessed as administratrix of his effects, to which she and her infant brothers and sisters were entitled, and the husband continued the business of the father for their benefit; Lord Eldon held, that this was not such a possession of the goods by the bankrupt, as could be deemed a leaving them in his order and disposition with the consent of the owner—as the infants were incapable in law of giving any consent.⁴

Where the bankrupt was executor and also *residuary legatee*, and before his bankruptcy had collected in sufficient assets to pay the debts and legacies, and the residue consisted of debts and mortgages due to the testator—Lord Hardwicke said, that in such a case, though they could not in law vest in the assignees, as the bankrupt took them *in auter droit* as executor, yet that the *equitable* interest belonged to the assignees, and that he would not scruple to let them sue in the bankrupt's name to get in the debts.⁵ But where a bankrupt, after obtaining his certificate, (which, however, was subsequently held to have been obtained by fraud,) became possessed of leasehold premises, as executor and *residuary legatee*, which he mortgaged, and afterwards assigned the equity of redemption to another person, and the deed recited, that the assignment was made for the purpose of paying the debts of the testatrix; and the assignee of the equity of redemption took an assignment of the mortgage; the claim of the latter was held preferable to that of the assignees under the commission, as *they* could only be entitled to the rights of a residuary legatee, and a residuary legatee is bound by an assignment made by the executor for a valuable consideration.⁶

Where a bankrupt, who was entitled to take out administration to the effects of an intestate, neglected to do so,

¹ *Ex parte Wright*, 2 M. D. & D. 491.

² *Ex parte Marsh*, *supra*.

³ *Ludlow v. Browning*, 11 Mod. 138.

⁴ *Viner v. Cadell*, 3 Esp. 88.

⁵ *Butler v. Richardson*, 1 Atk. 213. Amb. 74.

⁶ *Bedford v. Woodham*, 4 Ves. 40, note (b.)

but took possession of the goods and remained in possession of them for a period of twelve years,—it was held, that this *was* a case of reputed ownership, and that the goods passed to his assignees.¹

So, where an hotel-keeper died intestate, leaving four children, upon which one of her daughters took possession of the stock and effects, and continued the business for a short time, when she admitted one of her brothers into partnership, and the two carried on the business together in their own names for nearly two years, paying some of the intestate's debts, as well as her funeral expenses; and the daughter then retired from the business, assigning her share to her brother, who carried it on in his own name for six months longer, when a joint fiat issued against the two; and after their bankruptcy, one of the other children took out administration to the intestate, and claimed the property from the assignees; it was held that this could not be considered trust property, but passed to the assignees under the clause of reputed ownership.²

SECTION VI.

Of Property fraudulently delivered in contemplation of Bankruptcy. •(And see as to a fraudulent or voluntary Conveyance, ante.)

The *voluntary* delivery, or disposal, by the bankrupt of any part of his property, in *contemplation* of bankruptcy, either to defeat the claims of his creditors generally, or to favour one in preference to others, is held to be fraudulent and void.³ This doctrine Lord Ellenborough has designated as an excrescence upon the bankrupt law, under which it was originally considered, that the acts of a trader only *subsequent* to his bankruptcy were strictly void⁴—the act of bankruptcy being held to draw the line of separation between that property which might be disposed of by the bankrupt, and that which vested in the assignees. But it occurred to those who presided in the courts, that it was unjust to permit a party, on the *eve of bankruptcy*, to make a voluntary disposition of his property in favour of a par-

¹ *Fox v. Fisher*, 3 B. & A. D. 40, reversing S. C. 2 M. D. & D. 135.

² *Ex parte Thomas*, 3 M. D. & ³ B. & P. 504. 11 East, 260.

⁴ 2 Camp. 168.

ticular creditor, leaving the mere husk to the rest; and, therefore, that a transfer made at such a period, and under such circumstances as evidently showed that it was made in contemplation of bankruptcy, and in order to favour a particular creditor, should be void.¹

In accordance with this doctrine, therefore, it is enacted by the 73rd section of the 6 Geo. 4, c. 16, that if the bankrupt, *being at the time insolvent*, shall (except on the marriage of any of his children, or for some valuable consideration) have assigned or transferred to any of his children, or any other person, any goods or chattels, or have delivered or made over any *bonds, bills, notes, or other securities*, or transferred his debts to any other person, or into any other person's name, the commissioners may, in such case, sell and dispose of the same in the same way, as of the bankrupt's other property.²

By 2 & 3 Vict. c. 29, all dealings and transactions with any bankrupt, *bona fide* made and entered into before the date and issuing of the fiat, are now declared to be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with the bankrupt, had *not* at the time notice of any prior act of bankruptcy. But this statute will not protect a transfer of goods where the party is at the time insolvent, nor one made even in satisfaction of a *bona fide* debt, where it is made voluntarily, and in contemplation of bankruptcy.³

Gifts to children.] It was formerly held by Lord Northington, that a *gift of money* to a child, for his maintenance and subsistence in the world, could not be supported against creditors; for that no man had such a power over his own property, as to defeat his creditors in the disposition of it, unless for good consideration; and that blood had been held to be not a good consideration.⁴ But in a later case Lord Eldon held, that a gift of 900*l.* to his son by a man, who not till three years afterwards became bankrupt (though the gift was not in consideration of marriage, or to buy him a share in a partnership), *could* be supported against creditors; and that the 1 Jac. 1, c. 15, s. 5, did not extend to a payment of *money*.⁵ And the court of King's Bench has also decided to the same effect.⁶ So a gift of 200*l.*

¹ 1 Star. 89.

² This section is taken from the 1 Jac. 1, c. 15, s. 5, but the words in italics were not in that statute.

³ *Bevan v. Nunn*, 9 Bing. 107.

⁴ *Partridge v. Goff*, Amb. 596.

⁵ *Ex parte Shorland*, 7 Ves. 88. *Ex parte Smith*, 1 Rose, 210.

⁶ *Kensington v. Chantler*, 2 M. & S. 36.

by the bankrupt to his son, in the ordinary course in which his father was maintaining him, though made on the very day that the bankrupt stopped payment, was held to be not such a fraudulent transfer of property, as to be recoverable back in an action by the assignees against the son.¹ The word *money*, it will be observed, is not comprised in the above section any more than in the statute of James, being confined to things only which are the subject of conveyance. And, indeed, alarming consequences would follow, if the statute was to extend to payments of money; for a son might, then, be liable to refund any portion of money given to him by his father some time before the bankruptcy, and purely with the intention of providing for his maintenance. Upon the same principle as that which governed the last two cases, it was held, also, that where one of the partners of a bank from time to time transferred sums of money, to the credit of his son's private account with the banking-house, the son was entitled to prove for the amount under a commission against the partnership.²

Stock, it has been decided, comes within the description: "goods and chattels." Where the bankrupt, therefore, purchased stock in the name of his son (a minor) as a trustee for him, the stock was held to belong to the assignees.³

Where a trader advanced to a lessee half of the fine necessary to procure a renewal of a lease, and took from him a promissory note to repay the money, unless he should by will bequeath the leasehold estate to one of the trader's children, and the lessee bequeathed the estate accordingly, but *before his death* the trader became a bankrupt; and, after the lessee's death, the assignees filed a bill against the child of the bankrupt, claiming the money advanced, or half the estate; Lord Thurlow held, that if it was money advanced without a lien, it might be dangerous to give it to the assignees; but that, as far as the money advanced was a lien, the father procured an interest, which must go to the assignees.⁴

What amounts to a delivery.] If a trader fraudulently inclose a bill of exchange in a letter to a creditor, that amounts to a fraudulent delivery, although there is no evidence that the bill ever came to the hands of the creditor, or that he would have accepted it.⁵

¹ *Abell v. Daniell*, Mood. & M. 371.

² *Ex parte Skirratt*, 2 Rose, 384.

³ *Brown v. Bellasis*, 5 Mad. 53.

⁴ *Fryer v. Flood*, 1 Bro. 160.

⁵ *Cumming v. Bailey*, 6 Bing. 369.

What is a fraudulent preference.] With respect to what is, and what is not, considered an undue preference by the bankrupt of any particular creditor,—each case of this kind must depend upon its own peculiar circumstances; of which, perhaps, the most material is, the relative situation in which the bankrupt and the creditor stand with each other at the time of the delivery, or transfer, of the bankrupt's property. And whether a payment is made by a party, with a view to the probability of his becoming a bankrupt, and in fraudulent preference of the creditor, is entirely a question for the consideration of the jury.¹ If his condition and conduct be such as to evince clearly a contemplation that his embarrassments must of necessity end in *bankruptcy*, the jury will not be warranted in coming to any other conclusion, than that the transaction is fraudulent. But, inasmuch as every man has, down to the time of committing an act of bankruptcy, the sole right of dominion over his property, such a payment cannot be held to be a fraudulent preference, where the bankrupt, at the time of making it, appears to entertain a *bonâ fide* hope that he may be extricated from his difficulties, without being made a bankrupt. Whether, or not, a payment is made in contemplation of bankruptcy, is so much a question of law, as well as of fact, that although two juries have decided it in the negative, a court of common law, if satisfied that their conclusion is erroneous, will even send the cause down to a third trial.²

Although a transaction may be made to assume the appearance of a *sale* of the goods by the bankrupt to the creditor, yet if other circumstances show that it was but a *pretended sale*, the delivery of the goods will be fraudulent and void.³ So, though it may amount to an *absolute sale*, yet where it appears that the *intention* of the bankrupt was to give the creditor an undue preference, the sale will, in this case, be equally void as against the assignees.⁴ But where a creditor, being unable to procure payment for some barley which he had sold to the bankrupt, and suspecting him to be in bad circumstances, re-purchased the barley by a third person, and in his name, a short time before the bankruptcy,—the *bankrupt not being privy* to the contrivance of the creditor,—it was held, that this was no fraud against the bankrupt law.⁵

¹ *Flook v. Jones*, 4 Bing. 20. *Poland v. Glyn*, ib. 22 note (a). *Gibson v. Boutts*, 3 Scott, 229.

² *Gibson v. Mushett*, 4 Man. & G. 160. 3 Scott, N. R. 427.

³ *Rust v. Cooper*, Cowp. 629.

⁴ *Martin v. Pewtress*, 4 Burr. 2477.

⁵ *Harris v. Lunell*, 1 B. & B. 390.

The delivery of the property, however, will in general be considered fraudulent, when it is not delivered in the *usual course of trade*, or of the accustomed dealing between the parties.¹ Thus, where a bankrupt, on the *eve of his bankruptcy*, indorsed and sent a promissory note by the post to a creditor, to whom he had never made a payment in such a manner before, and *no application* had been on this occasion made by the creditor to the bankrupt for a note, or for payment,—the transaction was held to be fraudulent and void.² So, where a trader in embarrassed circumstances gave his creditor a promissory note for the *whole* of his debt in consideration of his promise to induce the *other creditors* to agree to a *composition*, each party undertaking to keep the matter a *secret* from the other creditors;³ or, where stock was transferred to a creditor who had struck a docket, in consideration of his *agreeing not to prosecute the docket*; each of these transactions was held a fraud upon the bankrupt law.⁴ And the same, where a bankrupt had, in contemplation of absconding, inclosed certain bills to a creditor, saying, “he has the honour to *show him that preference*, which he conceives is certainly his due;” for though the inclosure was made, without the privity of the creditor, yet the express motive of the bankrupt was to give him a *preference*.⁵ Where a trader also had voluntarily, *without being called upon for the money*, executed an assignment of a third part of his effects to his brother, in consideration of a previous loan of 120*l.*,—although possession was delivered instantly, and several acts of ownership were exercised by the brother, who had no knowledge or suspicion of the insolvency,—yet, as the trader in two days afterwards absconded, and was declared a bankrupt, the court held the deed void, as partial and unjust to the other creditors,⁶ and as being made *in contemplation of bankruptcy*. So, where a trader (knowing himself to be insolvent) called upon his creditor and informed him of it, when the creditor said, he must nevertheless be paid his debt, which was accordingly done, and the trader immediately afterwards became a bankrupt; this was held to be a void transaction, inasmuch as the circumstance, of the trader *calling upon his creditor and disclosing to him his situation*, and then acceding directly to his request of payment, afforded strong grounds for inferring a

¹ *Alderson v. Temple*, 4 Burr. 2235. 1 Bl. 441.

² 4 Burr. 2235.

³ *Wells v. Girling*, 1 B. & B. 447.

⁴ *Cory v. Gertchen*, 2 Mad. 40.

⁵ *Harman v. Fisher*, Cowp. 117.

⁶ *Linton v. Bartlett*, 3 Wils. 47.

Cowp. 124.

fraudulent performance.¹ So, also, where any *voluntary payment* is made to a creditor under such circumstances, that in the judgment of any reasonable man a bankruptcy was inevitable,—or that the bankrupt must be supposed to have² anticipated that a bankruptcy would in all human probability follow,—such payment will be a fraud upon the other creditors; and the money so paid may be recovered back by the assignees.³

What payments not voluntary.] But a payment is *not voluntary*, which is made by a bankrupt to a creditor, in consideration of the latter relinquishing some right he then possessed, although the creditor may not, previously to relinquishing such right, have stipulated for any payment by the bankrupt. Thus, where a creditor, who had a lien on the bankrupt's ship, received from him shortly before his bankruptcy the balance due on account of disbursements made on the ship, and then delivered up the ship's papers to the bankrupt, without having previously stipulated for payment of the balance, as a condition for the surrender of his lien,—it was held, nevertheless, that the creditor was entitled to retain this payment as against the assignees.⁴ So, where the bankrupt paid his landlord five quarters' *rent*, even after an act of bankruptcy, the payment was held to be good; for the landlord had a right of distress and re-entry for the rent, and he is at liberty to waive that right if he chooses, and accept of the rent instead.⁵ And in all cases, where a bankrupt has paid a creditor his debt, in the *regular course of trade*, or of *their dealings* with each other, this is a fair advantage, which the creditor is not compellable to relinquish; for it is a transaction that might pass between any two persons, without having anything like bankruptcy in contemplation.⁶ Thus, where a bankrupt, then solvent, ordered his correspondent at Bombay to remit certain proceeds to an agent in England, who was in the habit of accepting bills for the bankrupt; though the remittance was not, in fact, made until after the act of bankruptcy, yet, as the order was given by the bankrupt when he was solvent, and

¹ *Singleton v. Buller*, 2 B. & P. 283.

² *Gibbins v. Phillips*, 7 B. & C. 534.

³ *Poland v. Glyn*, 4 Bing. 22.
2 Dowl. & R. 310. In the report of this case (in 2 D. & R.), Best, C.J., observes, that many im-

portant facts are omitted. 4 Bing. 25.

⁴ *Thompson v. Beaton*, 1 Bing. 145. 7 Moore, 548.

⁵ *Mavor v. Croome*, 1 Bing. 261.
Stevenson v. Wood, 5 Esp. 200.

⁶ Per Lord Mansfield, 4 Burr. 2235.

there was no fraud in the case, it was held that the agent was entitled to retain the amount of his remittance, in satisfaction of a balance due to him from the bankrupt.¹

And where the bankers of the bankrupt had discounted for him a bill payable January 10th, the payment of which was guaranteed by L., and on the 3rd of January the bankrupt, being in embarrassed circumstances, gave L. a check on the bankers for the amount of the bill, and the bankers, on receiving the check, handed the bill over to L., and the bankruptcy took place on the 9th of January; it was held that the assignees could not sue the bankers, as having received the amount of the check by way of fraudulent preference.²

So, where one of the partners in a banking firm, which was in insolvent circumstances, and about to stop payment, informed a creditor of the state of the house, two days before the stoppage took place, in consequence of which the creditor took measures by which his account was drawn out by a check upon the bank; it was held that this was not a fraudulent preference of the creditor, but nothing more than an ordering payment of a banker's check.³

And where a party, being in insolvent circumstances, sold off all his goods by auction, in order that his effects might be rateably divided amongst his creditors, and the proceedings of the sale were, with his assent, paid over by the auctioneer to the insolvent's attorney, who, after making several payments to and for the account of the insolvent, retained against the assignees the whole amount of his bill for the business done for the insolvent; it was held that this was not a fraudulent preference of the attorney, there being no proof that it was intended that he should hold the proceeds for his own benefit, or otherwise than as the agent of the insolvent.⁴

Payments in pursuance of a previous agreement.] So, even if the transaction amounts in reality to the preference of a creditor, yet if such preference be only consequential to the contract—as, if the payment is made, or the act done, merely in pursuance of a prior agreement between the parties,—the creditor, in this case, will not be liable to refund to the assignees.⁵

¹ *Jamieson v. Hodson*, 1 Star. 150.
Alley v. Hodson, 4 Camp. 325.

² *Abbott v. Pomfret*, 1 Bing. N. C. 462. 1 Scott, 470.

³ *Belcher v. Jones*, 2 Mees. & W. 258.

⁴ *Wainwright v. Clement*, 4 Mees. & W. 385.

⁵ Per Lord Mansfield, Cowp. 117.

Thus, where an army agent was in the habit of advancing money to his customers on their pay and pensions, by checks on his bankers; and having overdrawn his banking account, he received a new credit from the bankers, and engaged in return to pay over to them, on receipt, the sums which usually came to his hands half-yearly from government for the discharge of pensions, the agreement not being known to the persons who issued these funds; and he committed an act of bankruptcy unknown to the bankers, and having subsequently received some government remittances, paid them over according to the above arrangement, being indebted to the bankers in more than the amount; it was held, that if these sums were put into the bank, merely to enable the bankrupt to go on in business for a time, they were not payments in fraud of creditors.¹ And in one case a payment made in pursuance of a previous agreement was not considered a fraudulent preference, although the prior agreement was entered into at the time when the bankrupt was insolvent, and the creditor knew he was so.²

But where bankers fraudulently sold out stock belonging to a customer, which stood in their names, and applied the proceeds to their own use; and afterwards, whilst they remained solvent, wrapped up certain bonds of their own in an envelope, inscribed with the customer's name, and inclosed a memorandum stating that they had deposited the bonds with him, as a collateral security for his stock, which they promised to replace, and then deposited the parcel amongst the securities belonging to other persons who dealt with them, but without giving any information of these circumstances to the customer until the evening before their bankruptcy, when they sent him the parcel with the bonds, saying, that they must stop payment the next morning; it was held, that the customer could not, under these circumstances, retain the bonds against the assignees³ of the bankers; for, though the bankers intended to deliver the bonds to him, he had never *actual possession* of them, until the very *eve of the bankruptcy*; and a contemplated appropriation does not amount to an actual transfer.

Where a trader, however, had obtained bills of exchange from the defendant, upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day (being resolved to stop payment) informed the defendant that he had

¹ *Vacher v. Cocks*, 1 B. & Ad. 145.

³ *Wilson v. Balfour*, 2 Camp.

² *Hunt v. Mortimer*, 10 B. & C. 44. 579.

repented of what he had done, and had sent express to stop the bills, and would return them,—and three days afterwards committed an act of bankruptcy—after which he returned to the defendant all the bills (except one that had been discounted), and also two bank notes, part of the proceeds of such discount,—upon which the defendant delivered back the security, and afterwards a commission issued against the trader, and his assignees then brought trover against the defendant for these bills and bank notes; it was held, in this case, that the defendant was entitled to retain all the bills and notes so returned by the bankrupt, on the ground that the bills were originally obtained under a *false pretence* of giving a good security, and that since, under such circumstances, a court of equity would order the property to be restored, it would be useless for a court of law to permit that to be recovered, which could not be retained.¹

Apprehension of legal process.] So, where a trader, under a threat, or an apprehension merely, of legal process, civil or criminal,² or from the pressure and importunity of his creditor³—or in pursuance of a *bonâ fide* demand made by the creditor,⁴ delivers property to him, or gives him a power to receive it; the transaction in any of these cases is not considered a fraudulent preference, even though the trader knew himself to be insolvent; for the act on his part is not a *voluntary act*, (which is implied in the *preference* of one creditor to another,) but one, which proceeds from the effect of fear or apprehension.⁵ And even where a trader, in contemplation of bankruptcy, is *intending* to give a creditor a voluntary preference, but before the intention is consummated, the creditor calls and demands payment of his debt,—the payment in such a case has been held to be good.⁶

But where the transfer or delivery of property (upon the importunity of a creditor) *does not redeem a trader from any present difficulty*,—which is the ordinary motive for such an act, when really done under the pressure of a threat,—

¹ *Gladstone v. Hadwen*, 1 M. & S. 517.

² *Ex parte De Tastet*, Mont. 138. 154.

³ *Morgan v. Brundrett*, 2 Nev. & M. 281.

⁴ *Mogg v. Baker*, 4 Mees. & W. 348.

⁵ *Thompson v. Freeman*, 1 T. R. 155. *Casser v. Gough*, *ibid.* 156, note (c). *Hartshorn v. Slodden*,

2 B. & P. 582. *Ex parte Scudmore*, 3 Ves. 85. *Yeates v. Grove*, 1 Ves. jr. 280. *Holbird v. Anderson*, 5 T. R. 235. *Smith v. Payne*, 6 T. R. 152. *Crosby v. Crouch*, 2 Camp. 166. 11 East, 256. *De Tastet v. Carrol*, 1 Star. 88. *Reid v. Aylm*, 1 Holt, N. P. Rep. 503. *Arbousin v. Hanbury*, *ibid.* 575.

⁶ *Bayley v. Ballard*, 1 Camp. 416.

this has been held to be *evidence* that the transfer was *not made* under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. Thus, where a trader, upon being pressed by a creditor for payment or security (one or other of which he said he *would have*) gave a bill of sale of what was apparently the *whole of his stock*, and immediately afterwards left his business and home, and became a bankrupt;—this transaction, notwithstanding the pressure, was held void as against the assignees.¹

So, where a trader, in desperate circumstances, had been threatened to be arrested by a creditor, and the creditor afterwards told him that “he would be fooled no longer,” upon which the trader paid the debt, but the payment did not relieve him from his difficulties, or render it more probable that he would continue his business, and in the evening of the same day he committed an act of bankruptcy, and a jury, under these circumstances, found that the payment was voluntary, the court of Common Pleas refused to disturb the verdict.²

When voluntary transfer valid.] But even a *voluntary transfer* of property, made by a trader in a situation of impending bankruptcy, will not be void, if made *bonâ fide*, and not from any motive of undue preference. As, in a case, where certain traders ordered goods of a manufacturer to be sent to their agents to be shipped, and after the goods were delivered to such agents, (the traders having stopped payment,) the manufacturer got possession of the goods, by indemnifying the agents for delivering them up to him; and the traders, having called a meeting of their creditors, were encouraged by the result of such meeting, as well as by legal advice, to give up all claim to the goods to the manufacturer, which they accordingly did the latter end of July, but did not commit an act of bankruptcy until the 26th of September; it was held that the above circumstances were evidence for a jury to find, that the goods were given up *bonâ fide*, and not from any wish to give an undue preference.³

So, though a trader may *contemplate that his trade must cease*, and that he cannot pay his creditors unless they give him time, it does not necessarily follow that he contemplates bankruptcy. Thus, where B. had purchased goods on

¹ *Thornton v. Hargreaves*, 7 East, 544.

² *Cook v. Rogers*, 7 Bing. 430.

³ *Dixon v. Baldwin*, 5 East, 175.

October 8th for the purpose of exportation, but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them to the seller on October 16th, and on the 17th he stopped payment, but, expecting remittances from abroad more than sufficient to pay his debts, he had no doubt but that his creditors would give him time, which they, however, refused, and a commission issued against him the 2nd of November; it was held, that under these facts the jury were warranted in finding, that the re-delivery of the goods to the seller was not made in *contemplation of bankruptcy*.¹ So also, where a preference is given by a trader, in *contemplation of an intended deed of composition*,—though it would have been fraudulent as against the creditors under that deed, if it had been carried into effect,—yet, as a commission of bankruptcy did not issue until four months afterwards, this was held to be not a preference in contemplation of bankruptcy; for *no commission* was, in fact, *contemplated* at the time the preference was given.²

But where a creditor refused to join in a composition deed, by which the bankrupt was to be released from his debts on paying 8s. in the pound, unless the bankrupt assigned a policy of assurance to the creditor, which was accordingly done; it was held that such assignment was a fraud, and that the assignees under the bankruptcy were entitled to recover from the creditor the money he had received on the policy, notwithstanding the 8s. in the pound was never paid.³ For a creditor cannot ostensibly accept a composition, and at the same time stipulate for a particular advantage to himself, which is not expressed in the composition deed, nor communicated to the other creditors.⁴

And where cash and notes were delivered over by the partners of a country bank, being at the time in failing circumstances, and having suspended payment, and who, a few days afterwards, became bankrupts, were held to be recoverable by the assignees, as money had and received to their use, although there was no idea, at the time of delivery, of giving an undue preference, and no contemplation of an act of bankruptcy.⁵ But where a merchant in London received bills of exchange from his correspondent at Amsterdam, to whom he was indebted beyond the amount of the bills, and,

¹ *Fidgeon v. Sharp*, 1 Marsh, 196.

² Taunt. 539. S. P. *Atkinson v. Brindall*, 2 Bing. N. C. 925.

³ *Wheelwright v. Jackson*, 5 Taunt. 109.

⁴ *Alsager v. Spalding*, 4 Bing. N. C. 407. 6 Scott, 204.

⁵ *Cullingworth v. Loyd*, 2 Beav. 385.

⁶ *Simpson v. Sikes*, 6 M. & S. 295.

after stopping payment, called a meeting of his creditors on the 7th of January, when it was agreed that the bills should be delivered to an agent in London of the creditors at Amsterdam, in order to receive the money and hold it for the persons who might be ultimately entitled to it; but the bills had been previously delivered by the merchant to such agent, for the use and on the account of the creditor at Amsterdam, and the agent received payment of the bills as they respectively became due; and the *act of bankruptcy* was not committed till October following, when a commission issued against the merchant: under these circumstances, Lord Ellenborough held that the assignees could not maintain an action against the agent for the amount of the bills, as they were deposited with him for the use and benefit of the creditor, and the bankrupt might, at the time of the deposit, have himself directly returned them to Amsterdam.¹

Where a creditor alleges, in his petition, that there has been a fraudulent preference of another creditor by the bankrupt, the court of review will send the case for inquiry before the commissioner, the creditor undertaking to pay the costs of the inquiry.²

SECTION VII.

Goods in Transitu, and herein of the Right of Stoppage.

The assignees are not entitled to any goods consigned to the bankrupt, which may be stopped *in transitu*, whether such goods are consigned to the bankrupt himself, or whether he obtains possession of them *in their transit* to the hands of the regular consignee.

The right of stoppage *in transitu* is a privilege which the law affords to every vendor who has *not been paid* for goods, in order to protect himself against the insolvency of the vendee. Though forming part of the general law of merchants,³ it seems with us in England to have been first established in the court of chancery, as a kind of equitable

¹ *Graff v. Greffulhe*, 1 Camp. 89.

² *Ex parte Billing*, 1 D. & C. 112.

³ 6 Robins's Adm. Rep. 325. In Russia and in France, if a seller can merely identify the property, though it may be in the actual pos-

session of an insolvent vendee, he is entitled to have it back again (1 East, 515. Abbott on Shipping, 333, et seq.); and this was also the rule of the ancient civil law, Dig. 18, 1, 19.

lien,¹ and to have been afterwards adopted by the courts of common law, for the purposes of substantial justice, and to prevent the debts of one man being paid with the effects of another.² But, from whatever source it sprung, it is a right now universally recognized in all cases between an *unpaid* vendor of goods and the vendee; so much so, indeed, that Lord Hardwicke once observed in a matter of this kind, that if the assignor could get his goods back again by any means, provided he did *not steal them*, he would not blame him.³ As between the vendor and vendee, however, the right does not (strictly speaking) exist, unless the vendee proves insolvent; for if a vendor, from misinformation, or excess of caution, assumes this privilege during the vendee's solvency, he assumes a right which does not belong to him; and the vendee would, in such case, be entitled not only to the delivery of the goods, but also to indemnity from the vendor for the expenses incurred in obtaining possession⁴ of them. But it is not necessary that the vendee should be *actually insolvent* at the time the goods are stopped; for if he *proves* to be so before the ordinary time when they would have reached their destination, the vendor will in that case have been justified in the exercise of this right, and to the benefit of his own provisional⁵ caution.

In the multifarious changes of ownership, however, which merchandize is occasionally subject to in its transit from one trader to another, questions of difficulty will frequently occur between the *consignor and third persons*, when the consignee assigns for a valuable consideration the bill of lading of the goods transmitted to him by the consignor, and without notice (on the part of such third persons) that the goods have not been paid for by the consignee. It is proposed, therefore, to consider the right of stoppage *in transitu* under two divisions: *first*, as it relates to questions simply between the *consignor and consignee*, where there has been no resale, or alienation, of the goods by the consignee; and, *secondly*, as to questions between the *consignor and third persons*, where there has been such resale or alienation.

¹ *Wiseman v. Vandeput*, 2 Vern. 203. *Snee v. Prescott*, 1 Atk. 245. *D'Aquila v. Lambert*, Amb. 399. 2 Eden, Rep. 75.

² 7 T. R. 445.

³ *Snee v. Prescott*, 1 Atk. 250. Lord Kenyon said, (3 T. R. 467,) that the doctrine of stopping goods *in transitu* was bottomed on *Snee v. Prescott*, on which all the other

cases are founded; but the right was recognized in *Wiseman v. Vandeput*, 2 Vern. 203, long before the case of *Snee v. Prescott* occurred.

⁴ Per Sir W. Scott, 6 Rob. Adm. Rep., case of *The Constantia*; and see *Ellis v. Hunt*, 3 T. R. 469.

⁵ *Ibid.*

Between the consignor and consignee.] And, first, as to questions between the *consignor and consignee*, where there has been *no resale or alienation* by the consignee.

All goods not paid for by a consignee may be stopped by the consignor in any period of their transit, ere they reach the hands of the consignee,¹ whether delivered to a *wharfinger*,² a *carrier*, an *innkeeper*,³ a *master of a vessel*,⁴ or in fact to any other person, either to forward, or to carry and deliver to the consignee. And even when goods are delivered to a *common carrier*, or on board a *general ship*, at the request and appointment and in the *name of the consignee*, and at his risk and expense; the consignor is nevertheless entitled, if the consignee become insolvent before the goods arrive, to stop them *in transitu*.⁵ For a delivery of this nature to a carrier, or master of a ship, being made merely for the purpose of forwarding the goods to their destination, is only a *constructive*, and not an *actual*, delivery to the consignee; and, though in cases as between buyer and seller, if no bankruptcy or insolvency happen, the goods in such a case may be considered in the possession of the buyer the instant they go out of the possession of the vendor, yet, in the event of the *bankruptcy of the vendee*, an *actual delivery* is necessary to divest the vendor's right of stopping the goods *in transitu*.⁶ Therefore, where A. having contracted for the purchase of a cargo of deals to be shipped from St. Petersburg, accepted a bill for the amount, and effected an insurance on the cargo; and a loss having occurred, A. gave the underwriters notice of abandonment the day before the bill became due, but the deals were afterwards stopped *in transitu* at Elsinore, before A. became a bankrupt; it was held that A.'s assignees could not recover against the underwriters, as A., after the stoppage *in transitu*, had no longer an insurable interest.⁷ The same rule applies when the goods are delivered to a *packer*, or *wharfinger*, at the request of the consignee, to be forwarded to their place of ultimate destination; for, in such a case, the *packer*, or *wharfinger*, is considered merely as a *middle man*,

¹ *Wiseman v. Vandeput*, 2 Vern.

203. *Ex parte Clare*, 1 C. B. L.

383. *Snee v. Prescott*, 1 Atk. 245.

Northey v. Field, 2 Esp. 613. *Bir-*

nett v. Jenkins, cit. Cowp. 295.

² *Mills v. Ball*, 2 B. & P. 457.

³ *Hunter v. Beal*, cit. 3 T. R.

466.

⁴ *D'Aquila v. Lambert*, Amb.

399. 2 Eden, 75. 1 C. B. L. 382.

Ex parte Wilkinson, cit. Amb. 400.

Ex parte Walker, 1 C. B. L. 394.

⁵ *Walley v. Montgomery*, 3 East,

585.

⁶ *Per Buller J., Ellis v. Hunt*,

3 T. R. 469. *Per Lord Hardwicke*,

1 Atk. 284. *Stokes v. La Riviere*,

cit. 3 T. R. 466.

⁷ *Clay v. Harrison*, 10 B. & C.

99.

and only one of the hands by which the goods are to be forwarded.¹ And in a case of this description, it is a proper question for the jury, whether the wharfinger took possession of the goods for the conveyance, as the owner of them, or as an agent merely to forward them to him in their transit from the consignor.² So, where A. agreed to buy some articles of plate of B., who was to get A.'s arms engraved upon them, and to pay for the engraving; it was held that a delivery to the engraver for that purpose was not a delivery to A., so as to defeat B.'s right of stopping the plate *in transitu*.³

But, where the buyer of goods has *no warehouse of his own* to receive them, except that of a *packer*, or a *wharfinger*, and is in the habit of using their warehouse as the general repository of his goods, the *transitus* in this case will be at an end, when the goods arrive at such warehouse; for the *packer and wharfinger* are then considered as the *private agents* of the buyer, and their possession as that of the buyer himself.⁴ And so, where a trader in London, having *no warehouse of his own*, was accustomed to purchase goods at Manchester, and export them to the continent; and the goods after their arrival in London remained in the *waggon-office of the carriers*, until they were removed by the trader for the purpose of being shipped; it was held, under these circumstances, that the *transitus* of the goods were at an end on their arrival at the *waggon-office*.⁵ But this is not so when, at the time of the purchase of the goods, the *place of their ultimate destination is specified* by the buyer to the seller.⁶

It was said indeed by Lord Mansfield, that goods remained *in transitu*, until they came to the *corporal touch* of the vendee.⁷ But this is merely a figurative expression, and has never been literally adhered to.⁸ For, where the goods are bulky, there may be a symbolical delivery of them, without any change of place, or without the vendee even seeing them,—such as a delivery of the *key* of the warehouse⁹ where they are deposited,—or by the transfer of any other *indicia* of

¹ *Mills v. Ball*, 2 Bos. & P. 457.

Hunt v. Ward, cit. 3 T. R. 467.

Edwards v. Brewer, 2 Mees. & W. 375.

² *James v. Griffin*, 1 Tyrr. & G.

449. 1 Mees. & W. 2. 2 Ibid.

623.

³ *Owenson v. Morse*, 7 T. R. 64.

⁴ *Scott v. Pettit*, 3 Bos. & P. 469.

Richardson v. Goss, ibid. 127. Per

Chambre J., *Leeds v. Wright*, ibid.

320.

⁵ *Rowe v. Pickford*, 1 Moore, 526.

8 Taunt. 83.

⁶ *Coates v. Railton*, 1 B. & C. 422.

⁷ *Hunter v. Beal*, cit. 3 T. R. 466.

⁸ Per Lord K. 3 T. R. 468.

⁹ Per Lord Ellenborough, 12 East, 618. Per Lord K. 1 East, 192.

property, as of West India Dock warrants, where the goods are lying in the company's warehouses.¹ In such cases it is quite sufficient, if the goods come *virtually* into the possession of the vendee, and he has exercised over them some act of ownership.²

And where goods were consigned to a bankrupt in the country, and, as soon as they arrived at the inn there, his assignee went and put his *mark* upon them, but did not take them away; it was held, nevertheless, that the consignor could not afterwards stop them, as this was a sufficient taking possession of them, so as to prevent their being considered any longer *in transitu*.³ And so, where the vendee, on the arrival of the goods⁴ at the carrier's warehouse, takes away part, and takes samples of the other part, directing the latter part to remain in the warehouse of the carrier; for from that moment the latter ceases to be a carrier, and becomes a mere bailee. A vendor, however, does not lose his right, by the consignee merely making a *prior claim* to the goods; for there must be either a *delivery*, or some *taking of possession* by the vendee, in order to divest the vendor effectually of his right to stop them.⁵ And the *payment of freight* for the goods by the consignee, or his agent, appears not of itself to be a sufficient taking of possession, so as to deprive the consignor of his right of stoppage.⁶

But in all cases, where the goods are delivered by the vendor to a *particular agent, appointed by the vendee*, without being subject to any *ulterior destination*, and remain entirely under the vendee's control, the right of the vendor to stop *in transitu* is at an end.⁷

So, if goods at the time of the sale are in the hands of a wharfinger, (though not appointed by the vendee, but having been previously deposited with him by the vendor,) and the vendor delivers a note to the vendee, ordering the wharfinger to deliver the goods to him; and the wharfinger receives the note, and *nothing remains to be done by the vendor* in order to complete the sale; the wharfinger is, in this case, bound to hold the goods as the agent of the vendee, and the vendor cannot countermand the order for delivery; nor is a transfer

¹ *Keyser v. Suse*, Gow. N. P. C. 58. *Lucas v. Dorrien*, 7 Taunt. 276. 1 Moore, 29. *Zwinger v. Samuda*, 1 Holt. 395; and see 6 G. 4, c. 94, s. 2.

² *Wright v. Lawes*, 4 Esp. 82.

³ *Ellis v. Hunt*, 3 T. R. 464.

⁴ *Foster v. Frampton*, 6 B. & C. 109.

⁵ 1 Atk. 245. Amb. 399. 2 B. & P. 457.

⁶ *Mills v. Ball*, 2 B. & P. 457. *Kinlock v. Craig*, 3 T. R. 119.

⁷ *Dixon v. Baldwin*, 5 East, 175.

in the wharfinger's book, as we have before seen, necessary to complete the delivery.¹

But in all cases, where any material acts (previous to the delivery of goods) *remain to be done* by the vendor, or the wharfinger—such as the *weighing* or *measuring* of the goods, or the *separation* of the quantity sold from the general bulk,—the order for delivery may in that case be countermanded,² though it is even actually entered in the wharfinger's books, and the goods transferred into the name of the purchaser.³ So, where it was the practice for a wharfinger to deliver the goods upon the application of the consignee, and until such application to keep them on board the vessel; and, if not applied for before the vessel returned, to land them, and keep them in his warehouse to the order of the shipper;—it was held, that before any application had been made by the consignee, and before the goods were landed, the shipper might stop them *in transitu*, notwithstanding the consignee was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, and sometimes when it was landed and kept for him in the wharfinger's warehouses.⁴

It has been decided in one case, that though goods are permitted to remain in the warehouse of the vendor, yet, if he *receives warehouse rent* for them, this amounts to such a delivery, as prevents the vendor's right of stoppage *in transitu*;⁵ though this circumstance alone would not, if the *vendor*

¹ *Harman v. Anderson*, 2 Camp. 243. *Whitehouse v. Frost*, 12 East, 614.

² *Wallace v. Breeds*, 13 East, 522. *Hanson v. Meyer*, 6 East, 614. *Hawes v. Watson*, 2 B. & C. 548. *Rugg v. Minett*, 11 East, 210. *Austin v. Craven*, 4 Taunt, 644. *White v. Wilks*, 5 Taunt. 176. 1 Marsh. 2. *Zagury v. Furnell*, 2 Camp. 240. It is impossible to reconcile the case of *White v. Wilks* with that of *Whitehouse v. Frost*, supra; the latter case deciding that the delivery of a quantity of oil was complete, though the oil sold had not been actually separated from a larger quantity belonging to the vendor;—and the former, that such previous separation was absolutely necessary, before the delivery could be considered perfect. It was observed by Sir J. Mansfield, C. J., that the difficulty was much greater in

holding a commodity in a *liquid* state to be delivered, when not separated from the general mass,—than where the goods are of a *solid* substance. And the case of *Whitehouse v. Frost* was, as to this particular point, much questioned by the judges in *Austin v. Craven*, 4 Taunt. 644. Upon the whole, the better opinion seems to be, that wherever goods are in a general mass, whether in a solid, or a liquid state, a *separation* of the quantity sold is indispensable, to prevent the vendor's right to countermand the order, and stop the delivery.

³ *Shepley v. Davis*, 1 Marsh. 252. *Busk v. Davis*, 2 M. & S. 397.

⁴ *Tucker v. Humphrey*, 4 Bing. 516.

⁵ *Hurry v. Mangles*, 1 Camp. 452; but see per Heath J. 5 Taunt. 179.

become bankrupt, prevent his assignees from substantiating a claim, founded on the principle of *reputed ownership*. But where an unpaid vendor permits the goods to remain in his own warehouse *rent free*, it has been held that he may then stop them *in transitu*, although he has given the vendee a delivering order, under which part of the goods have been removed.¹

In general, however, a delivery of *part* of a consignment of goods to the consignee, puts an end to the *transitus* of the whole.² But where a carrier landed a *part* of the goods on the vendee's wharf, and then, finding that the vendee had stopped payment, reloaded the same on board his own barge, and took the whole of the goods to his own premises; it was held, that this did not amount to a delivery of the goods, so as to divest the consignor of his right to stop *in transitu*; for the *special property* remained in the *carrier*, after such part delivery, *until the freight was paid*, or until he had done some act to show that he *assented* to part with the possession of the goods, without receiving his freight.³

Where goods are delivered on board a ship in the actual possession of the vendee, that is, one which is let to him for a certain period, and over which he has the entire management and control;⁴ or if goods are delivered to the vendee at a wharf, and are afterwards shipped by him;⁵ the vendor has then in neither case a right to stop them *in transitu*. But this rule may be controlled in some measure by the laws of a foreign state, upon a transaction taking place within the foreign jurisdiction: as, where goods were put on board a ship in a port of Russia, and the consignors (who are by the law of that country entitled to sue out process, and retake their goods on board any ship, and retain them till they are paid for,) applied to the captain of the ship to sign the bills of lading to their order (which he complied with), without the necessity of suing out process; this was held to be a substantial compliance with the Russian law on the part of the captain, and that he was consequently bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt.⁶ And where the vendee has no control over the ship, but merely enters into

¹ *Townley v. Crump*, 5 Nev. & M. 606.

² *Stubey v. Hayward*, 2 H. B. 504. *Hammond v. Anderson*, 1 N. R. 69.

³ *Crawshaw v. Bades*, 1 B. & C. 181.

⁴ *Fowler v. Kymer*, cit. 7 T. R. 440. 1 East, 522. 3 East, 396.

⁵ *Noble v. Adams*, 7 Taunt. 59.

⁶ *Inglis v. Usherwood*, 1 East, 515.

an agreement with the master, for the ship to go to a particular port, and there receive goods on his account,—the delivery of goods on board a ship, under these circumstances, is not a delivery to the vendee; but the goods may be stopped, *in transitu*, as they might on board a *general* ship, without reference to the laws of any foreign state.¹

But where there is a *specific pledge* of a cargo, by express agreement between the parties, accompanied with an indorsement and delivery of the bill of lading by the consignor to the consignee,—then, after the goods are once put on board the ship by the consignor, it seems that he has afterwards no right to stop them *in transitu*. Thus, where a merchant at Liverpool, desiring an extension of credit upon a banking-house in London, agreed (among other securities) to consign certain goods to a mercantile house in London, consisting of the same partners as the banking-house, though under a different firm,—and accordingly remitted the invoice of a cargo, and the bill of lading indorsed in blank, to the mercantile house, but the cargo was prevented from leaving Liverpool by an embargo, and the consignor then became bankrupt, considerably indebted to the bankers; it was held that these circumstances amounted to an actual transfer of the goods by the consignor to the consignee; and that, upon the delivery on board the ship, they became vested in the consignee.² So, where C. advanced money to A., on an express agreement from A., that the proceeds of a cargo of fish (which A. had consigned to B. for sale) should be remitted to C., in order that they might constitute a security for the money advanced by C.; it was held, that this was an appropriation of the proceeds of the cargo, which A. could not rescind, by afterwards writing to B., that the cargo was not to be responsible for any advances made by C.; for his engagement with C. was not like a mere order for payment of money, which might be revoked by a subsequent countermand before payment; and that B., under these circumstances, was justified (as against A.'s assignees) in remitting the proceeds to C.³

Though the consignor has a right to stop the goods at any time before they reach their journey's end, yet it has been said, that if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage.⁴ But in a case where, upon the arrival of a ship

¹ *Bohtlinck v. Inglis*, 3 East, 311.

² *Fisher v. Müller*, 1 Bing. 150.

³ *Haitle v. Smith*, 1 B. & P. 563;
and see *Vertue v. Jewell*, 4 Camp. 31.

⁴ Per Lord Alvanley, 2 B. & P. 461.

at her port of discharge, the assignees of the consignee (who had become bankrupt) took possession of the cargo, and the ship was afterwards obliged to perform quarantine, during which the cargo was claimed by the consignor; it was ruled by Lord Kenyon, and his opinion was afterwards approved of by the court of King's Bench, that the consignor had a right to stop the goods, as the ship had *not completed her voyage* until quarantine was performed. And he is reported to have added, that if a consignee had a right to go out to sea to meet the ship, in order to take possession of the goods on board her *before the termination* of her voyage, it would go the length of saying, that he might meet the ship coming out of the port from whence she had been consigned; and thus immediately divest the property out of the consignor, and vest it in himself,—a position which of course could never be supported, as there would then be no possibility of stoppage *in transitu* at all.¹ There may, however, be a distinction between carriage *by sea* and carriage *by land* upon this point; for, in the former case, the master of the ship, by signing the bill of lading, *agrees with the consignor* to deliver the goods *at the destined port*; which therefore gives no authority to the consignee to demand them before their arrival;² whereas, in the latter case, no such express agreement is entered into between the consignor and the carrier.

The vendor is entitled to stop the goods in every part of their transit to the place of their destination; and, therefore, his merely handing over the shipping note and delivery order to the wharfinger before their arrival, was held not to transfer the property so entirely as to defeat his right to stop the goods, by an order to that effect given to the wharfinger two days before the arrival.³ And the right may be exercised also, without taking actual possession of the goods; for a claim made by the consignor upon the carrier, or middle man, is sufficient for that purpose.⁴ And if a carrier, after notice from the vendor to stop the goods *in transitu*, deliver them to the vendee by *mistake*, the sale to the vendee is nevertheless rescinded; and the vendor may bring trover for them against the vendee.⁵

A court of equity, it seems, will not assume a jurisdiction to stop *in transitu*, notwithstanding the right is recognized

¹ *Holst v. Pownall*, 1 Esp. 240.

² *Abbott on Shipping*, 388.

³ *Ackerman v. Humphrey*, Carr. N. P. Rep. 53.

⁴ *Holst v. Pownall*, 1 Esp. 240.

Northey v. Field, 2 Esp. 613.

⁵ *Litt v. Cowley*, 7 Taunt. 169; but see *Coxe v. Harden*, 4 East, 211.

in the vendor; and, therefore, an injunction was refused to restrain the sailing of a vessel, which contained goods sold to a person who had become insolvent, though the vendor retained his right to stop *in transitu*.¹

The consignor may expressly reserve to himself the right of determining *when* he will part with all control over the goods consigned, so as to abandon any further right to stop them *in transitu*. Therefore, where the master of a ship, on board of which the goods were laden, gave a receipt for them to the vendor, which receipt it was the practice to exchange afterwards with the master for the bill of lading, the holder of the receipt being considered as the person alone entitled to the bill of lading, and the receipt keeping full control over the goods till given up; it was held, that, though the vendee had got possession of a bill of lading of the goods, which had been improperly obtained from the master without the consent of the vendor, yet that the vendor, continuing in possession of the receipt, was entitled to stop the goods *in transitu*.² And so, even where the receipt for the goods had been merely demanded of the master, and which was refused to be signed by him at the time of the delivery on board; for the delivery was *not perfect and complete*, until that receipt was given.³

If goods consigned are lodged in the king's stores, on account of the duties not being paid, the consignor may stop them, if he claim them before they are actually sold for the payment of the duties; or if sold, he is entitled to the proceeds after payment of the duties.⁴

A payment by the consignee of *part only* of the purchase-money does not bar the right of the consignor to stop the goods *in transitu*.⁵ Neither is the consignor barred, where the consignee has accepted bills (which are afterwards dishonoured) on the credit of the consignment; for there is a great difference between *actual payment*, and a *liability to pay*.⁶ But it has been ruled by Lord Ellenborough *at nisi prius*, that, unless the vendee's acceptance is proved to have been *dishonoured*, the consignor has no right to stop *in transitu*; for he then stands in the situation of a paid seller.⁷ And this is consistent with what Lord Tenterden lays down in *Sowerby v. Brooks*, viz. that the acceptance of a bill, which

¹ *Goodhart v. Lowe*, 2 J. & W. 349.

² *Craven v. Ryder*, 6 Taunt. 433.

³ *Holt*, 100. ² *Marsh*, 127.

⁴ *Ruck v. Hatfield*, 5 B. & A. 632.

⁵ *Northey v. Field*, 2 Esp. 613.

⁶ *Hodgson v. Loy*, 7 T. R. 440.

⁷ *Feise v. Wray*, 3 East, 93.

Kinlock v. Craig, 3 T. R. 122, 783.

⁷ *Davis v. Reynolds*, 1 Star. 115.

is afterwards duly paid, is equivalent to the payment at the time of the acceptance.¹

It has, however, been decided, that a consignor, who has received the acceptance of the consignee for the amount of only *part* of the goods, may stop them *in transitu*, without sending back the acceptance.²

But though questions, as to the right of stoppage *in transitu*, generally occur between a vendor and vendee, yet the right also extends to cases where the contract between the parties is *in effect* a sale, and the consignor is substantially the vendor of the goods. Thus, where a trader here gives an order to his correspondent abroad, to procure and ship for him certain goods, which the latter procures *upon his own credit*, without naming the trader here, and ships to him at the original price, charging only his commission; the correspondent abroad is so far a vendor, as between him and the consignee, that on the bankruptcy of the latter, he may stop the goods *in transitu*.³ But, where a trader here ordered a correspondent abroad to ship him goods, for the amount of which his agent there accepted bills upon receiving a commission; and the agent also transmitted to the trader the bills of lading which he had *received from the trader's correspondent*; it was held, that the agent could not stop the goods *in transitu*, as he was no more than a surety for the price, and neither vendor nor consignor.⁴

A mere *lien*, however, upon goods does not give the consignor the same right to stop *in transitu*, as the right of property in them does. Therefore, if a man has a lien upon goods for work done to them, and he afterwards delivers them to a carrier, to be conveyed on account and at the risk of his principal, he cannot recover his lien by stopping the goods *in transitu*, and procuring them to be re-delivered to him.⁵

When a party remits *money* on a *particular account*, or for a *particular purpose*, it may be stopped *in transitu*; but not where it is a *general remittance* from a debtor to his creditor on account of his debt.⁶

The consignor of goods for sale, on the *joint account* of himself and the consignee, may stop them *in transitu*.⁷

¹ 4 B. & A. 525; and see *Hawkins v. Penfold*, 2 Ves. 550.

² *Edwards v. Brewer*, 2 Mees. & W. 375.

³ *Feise v. Wray*, 3 East, 93. 17.
Haikes v. Dunn, 1 Tyrr. 413.

⁴ *Siffen v. Wray*, 6 East, 371.

⁵ *Sweet v. Pym*, 1 East, 4.

⁶ *Smith v. Bowles*, 1 Esp. 578.

⁷ *Newsom v. Thornton*, 6 East,

So, where the sale is to a party trading under a licence with a hostile country, a vendor, though an *alien enemy*, is entitled to stop; for the licence gives to *both parties* the benefit of the contract.¹

As a vendor who is paid for goods, has no right to stop them *in transitu*, as against the person to whom he sold them, so neither can he exercise this right, on the insolvency of a *subsequent vendee*. Thus, where A. sold goods to B., (which were then entered in A.'s name in the books of the West India Dock Company,) and indorsed and delivered the dock-warrant to B., upon receiving payment for the goods, and B. afterwards sold the goods to C. on credit, and delivered to him the dock warrant; it was held that A. could not, on C.'s insolvency, lawfully take possession of the goods, though they continued to stand in A.'s name, and the warrant had never been lodged with the company.²

A vendor is not deprived of his right of stoppage, by any *usage among carriers* to retain goods as a security for the general balance due to them from the vendee, and may reclaim the goods out of the carrier's hands, upon payment of the price only of the carriage of the particular parcel of goods consigned.³ Neither is a vendee, who has paid the price of the goods to the vendor, deprived of his right to receive them from the carrier, by a similar usage as between the carrier and the vendor.⁴

Between consignor and third persons.] 2ndly. As to questions between the *consignor and third persons*, where there has been a resale or alienation of the goods by the consignee.

The right of a consignor to stop *in transitu*,—where there has been a resale or alienation of the goods by the vendee, or consignee, before their arrival or complete delivery to him,—until very lately depended mainly upon the question, whether the third person claiming under such resale or alienation, had, or had not, *notice*, that the consignor had *never received payment or value* for the goods; and also upon the acts of the consignor himself, in so far as they amounted either to a preservation of his right of stoppage *in transitu*,—or to an abandonment of it, by his assenting to a perfect delivery or transfer of the goods, whether to a first or second vendee.

¹ *Fenton v. Pearson*, 15 East, 419.

³ *Oppenheim v. Russell*, 3 B. &

² *Spear v. Travers*, 4 Camp. 251;

P. 42.

and see 6 Geo. 4, c. 94, s. 2, and post, 462.

⁴ *Butler v. Woolcot*, 2 N. R. 64.

Power of agent to sell or pledge.] But the law in this respect has of late years undergone a material alteration by two modern acts of parliament, namely, the 6 Geo. 4, c. 94,¹ and the 5 & 6 Vict. c. 39, the first of which it will be sufficient for our present purpose to consider. By the 6 Geo. 4, c. 94, s. 2, it is enacted, that where any person is entrusted with any *bill of lading*, or other mercantile document, for delivery of goods, he shall be deemed the true owner of the goods, so far as to give validity to any contract made by such person for the sale or disposition of them, or for the deposit or pledge thereof, as a security for advances made on the faith of any of such documents; provided the person making such advances has no notice, by any of such documents, or otherwise, that the person entrusted therewith is not the actual and *bona fide* owner.² But no person,³ who takes the goods in *deposit* or *pledge*, for a debt previously due, can acquire any further right, than that of the person entrusted with such goods or documents.

By section 4, also, any person may contract with any agent entrusted with goods, or to whom goods are consigned, for the *purchase* of them, and may receive the same of, and pay for the same to such agent; and such contract will be binding upon the owner, notwithstanding the buyer has notice that the seller is only an agent, provided the contract be made in the usual and ordinary course of business, and that the buyer, at the time of purchase or of payment, had no notice that such agent was not authorized to sell the goods.

It becomes important, therefore, to inquire how far these new enactments interfere with former cases, which involve the right of stoppage *in transitu*, as it affects *third persons*, and which have been hitherto regarded as the landmarks of the law, when a question of this nature has been brought before the courts.

And, *first*, as to the right of a consignor, or agent, to assign the bill of lading, or sell the goods consigned to him.

It was formerly decided by Lord Hardwicke,⁴ that, though a consignee of goods *assigned* the bill of lading⁵

¹ The 6 Geo. 4. c. 94, incorporates all the provisions of the 4 Geo. 4; and see post, "Lien."

² And see section 4.

³ Section 3.

⁴ *Snee v. Prescott*, 1 Atk. 245.

⁵ The first case in the books that recognized the right of the

consignee to assign the bill of lading, is *Evans v. Marlett*, 1 Lord Raymond, 271. 12 Mod. 156. 3 Salk. 290; which was followed by *Appleby v. Pollock*, mentioned in Abbott on Shipping, 344. But the legal effect of the assignment, as between the consignor and the

to a third person for a valuable consideration, the consignor was, nevertheless, *under any circumstances* previous to the arrival of the goods, entitled to stop them *in transitu*. But this decision had long ceased to be an authority on this particular point, and was first shaken by the opinions of the judges in *Lickbarrow v. Mason*.¹ As this last-mentioned case, which was carried through a protracted course of litigation, has been hitherto the leading one upon this branch of the subject, it may not be amiss to give some account of it; though the point which was originally determined by it, and which was afterwards contested by two different writs of error, never received a *final* decision.

When the case first came before the court of King's Bench, it was held that the right of the consignor to stop the goods *in transitu* was *divested* by the consignee *assigning* the bill of lading to a third person for a valuable consideration, *without notice* on the part of such third person that the goods were not paid for; and that there was no distinction, in this respect, between a bill of lading indorsed in blank, and an indorsement to a particular person. This judgment of the King's Bench was afterwards reversed, on a writ of error in the Exchequer Chamber, upon which occasion the opinion of the court was expressed by Lord Loughborough in a very elaborate judgment.² The record was then removed into the House of Lords, where the judgment given in the Exchequer Chamber was reversed, and a *venire facias de novo*³ was awarded. A new trial accordingly took place; when the jury found a special verdict, stating the same facts as had been given in evidence on the former trial, and finding also, that by the custom of merchants, bills of lading were (before the ship's arrival) *negotiable*, or transferable, by the shipper of the goods to any other person, by the shipper indorsing the bill of lading, and delivering or transmitting to him the same so indorsed; and that, by such indorsement and delivery, the property in the goods was wholly transferred; and also, that indorsements of bills of lading *in blank* might be filled up by the person to whom they were so delivered, with words ordering the delivery of the goods to be made to himself; and that the same, when so filled up, had the same operation, as if it had been done by the shipper when

assignee, does not appear to have been considered before *Snes v. Prescott*, and *Wright v. Campbell*, 4 Burr. 204 b.

¹ 2 T. R. 63. 6 East, 20, in note.

² 1 H. B. 357.

³ 4 Bro. Parl. Ca. 57.

he indorsed¹ the bill of lading. The court, upon this occasion, declined entering into a discussion of the case, as it was intended to carry it again to the House of Lords, merely saying, that they still retained their former opinion.² It does not appear, however, that the case was afterwards taken up to the House of Lords; but the doctrine, as laid down by the court of King's Bench in the first decision of it, has been since recognized in subsequent cases involving a similar question.

What notice binds indorsee of bill of lading.] By these cases the following distinction has been established, viz. wherever a bill of lading is indorsed, *with notice* to the indorsee that the goods *have not been paid for*,—or where the indorsee has *notice of the insolvency* of the consignee,—the indorsee then takes the bill of lading, subject to the same rights as the original consignee; and, therefore, the consignor is entitled to stop the goods *in transitu*.³ And it does not appear, that in this respect his right is affected by the provisions of the above acts.

This rule, however, as to *notice*, appears to have been extended in some degree, and not to be confined to *money payments*; for the expression, that occurs in the opinions of the judges in the cases where the rule was first laid down, viz. “without notice that the goods have *not been paid for*,” it has been since determined, is not to be understood in a restricted sense, but as conveying the meaning of “without notice of such circumstances, as would prevent the bill of lading from being *fairly and honestly assignable*.” Accordingly, where goods were consigned, payable for by the consignee in a bill at three months; and after the consignee had accepted such bill, and before it was due, he assigned the bill of lading to another person *bonâ fide* for a valuable consideration; it was held, that although such person knew at the time that the consignor had not received *actual payment in money* for the goods, yet that, after such assignment, the consignor could not stop the goods *in transitu*; for, if the indorsee of the bill of lading had known all the circumstances of the case, as they stood between

¹ If the bill of lading has been indorsed by the consignor, it seems that a second indorsement by the consignee is not necessary to perfect the transaction between him and the third person.—Abbott on Shipping, 399.

² 5 T. R. 683.

³ *Salomons v. Nissen*, 2 T. R. 674. *Vertue v. Jewell*, 4 Camp. 31. *Newsom v. Thornton*, 6 East, 17; and see *Wright v. Campbell*, 4 Burr. 2046.

the consignor and consignee, it was considered that he would have known nothing which would have made it unfair, either in the consignee to assign, or in himself to accept, the bill of lading. Any collusion, however, with the consignee to defeat the just rights of the consignor,—as, if the indorsee *knew that the bill of exchange would not be paid*, or that the consignee was *insolvent*,—would have made a difference in the case. But to hold, Lord Ellenborough says, that no bill of lading was assignable, unless the assignee was perfectly assured that the goods were paid for *in money*, would tend to overturn the general practice and course of dealing of the commercial world¹ on this subject. This reasoning also seems consistent with the principles of the above statutes, namely, that the transfer of a bill of lading shall convey the property in the goods, unless the person to whom it is transferred has notice that the person transferring it to him is not the actual and *bonâ fide* owner of the goods.

The legal and equitable rights of a consignor, after the transfer of the bill of lading by the consignee, are exemplified in the following case:—W. shipped at Leghorn twenty-three casks of oil, by the order of L. at Liverpool, and transmitted to him a bill of lading, which, before the arrival of the oil, L. indorsed to H., who advanced money on it, having previously advanced money on other goods (the property of L.) deposited with him. On the arrival of the oil, L. having previously become bankrupt, and W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it to H., who afterwards sold it, as well as the other goods of L., which had been deposited by him with H.; the net proceeds of the goods belonging to L. being sufficient to satisfy the debt due from L. to H. Under these circumstances, it was held that W., the unpaid vendor of the oil, had, at the time when his agent claimed it, no right to take possession of it on the insolvency of L., because both the property and the right of possession were then vested in H., the indorsee of the bill of lading, for value; and further, that W. had not, by reason of such claim, any *legal* right to the possession of the oil, after H.'s lien was satisfied; but that in a court of equity, such transfer to H. would be treated as a pledge or mortgage only, and therefore W., by his *attempted stoppage in transitu*, acquired an equitable right to the oil (subject to H.'s lien) against the assignees of L.; and it was also held, that

¹ *Cuming v. Brown*, 9 East, 506.

W., by means of his oil, having become surety to H. for L.'s debt, had a clear equity to oblige H. in the first place to pay his debt out of L.'s own goods, and as these were sufficient for that purpose, that W. was therefore entitled to have all the proceeds of the oil paid over to him.¹

How right of second purchasers affected.] The right of stoppage *in transitu*, as it is an equitable right, can only be exercised where it does not interfere with the just rights of *third persons*.² Therefore where a vendor of tallow (lying at a wharf) gave to the purchaser a written order on the wharfingers to weigh, deliver, transfer, and re-house the same; and the purchaser sold the tallow again to a second purchaser; upon which, the wharfingers wrote to the second purchaser, acknowledging that they had transferred the tallow to *his account*,—though the tallow had in fact not been weighed, since the order of the original vendor,—it was held, that whatever question there might have been as between buyer and seller, in consequence of such omission as to the weighing, yet that the *wharfingers*, (who were sued in trover by the second purchaser,) having acknowledged that they held the tallow *on his account*, could not afterwards dispute his title, in obedience to any order of the original vendor to stop the delivery of it to such second purchaser, notwithstanding the original vendor had not been paid by the first purchaser.³ So, where the vendee marked a quantity of timber lying at the vendor's wharf, and a small part was forwarded by the vendor to one place, and part to another; and the vendee afterwards, and before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the vendor, and was answered that "it was *very well*;" and then, in the presence of the vendor, the plaintiff marked all the timber lying at his wharf, and afterwards marked that which had been forwarded to the other two stages; it was held that the vendor (after such assent to the transfer) could not retain or stop any of the timber, as *in transitu*, upon the subsequent insolvency of the original vendee, to whom payment had been made by the plaintiff,—whatever question there might have been as between the original vendor and vendee.⁴ But a *mere resale* of goods by a vendee, who has never been in possession of

¹ *Westzinthus v. Assignees of Lapage*, 5 B. & Ad. 817.

² *Hawes v. Watson*, 2 B. & C. 308.
546, per Best, J.

³ *Ibid.* 540. 1 Ryan & M. 6.

⁴ *Stoveld v. Hughes*, 14 East,

the bill of lading, accompanied even with payment to him by the second vendee, will not destroy the vendor's right of stoppage *in transitu*,¹—notwithstanding the second vendee procures from the master of the ship (but without the consent of the vendor) a bill of lading to be made out to himself.

The indorsement of a bill of lading is not, strictly, an *actual transfer* in law of the *property in the goods* therein mentioned, though it is presumptive evidence of such a transfer, and though the possession of the bill of lading gives now, in fact, the right to dispose of the goods. But the object and legal effect of the indorsement *may* be ascertained by other evidence.² And there may be also other circumstances, which may be equivalent to such an indorsement, as against the consignor, or any other person acquainted with those circumstances: as, where merchants in Ireland consigned goods to London to be sold by their factors there, and sent them a bill of lading not indorsed, but saying that the omission was a mistake, and that they would send an indorsement, upon which the factors sold the goods, and, it afterwards happening that they were unable to pay bills drawn upon them by the consignors, the plaintiff paid the bills for the honour of the drawers, and, with knowledge of all these transactions, applied to the consignors for an indorsement of the bill of lading, which they sent him; it was held, under these circumstances, that the plaintiff had no right to take the goods out of the possession of the vendees of the factors, who were authorized to transfer the property in the goods, and who had actually done so.³ But, if there be no circumstances *equivalent* to an indorsement of the bill of lading by the consignor, and the delivery of the goods is specified in the bill to be—*to the order of the consignor, or his assigns*, and the bill of lading is transmitted *unindorsed*; the holder cannot then, by an attempt to transfer the property of the goods to a third person, divest the right of the consignor to stop them *in transitu*.⁴ And, indeed, in such a case the third person would, by the terms of the bill of lading itself, have (in the language of the 6 Geo. 4, c. 94, s. 2,) sufficient “notice that the person entrusted with the bill of lading was not the actual and *bonâ fide* owner of the goods.”

It has been decided, that an unpaid vendor of goods may

¹ *Craven v. Ryder*, 6 Taunt. 433.

² *Dick v. Lumsden, Peake*, 189.

³ 1 Holt, 100. 2 Marsh. 127.

⁴ *Nix v. Olive, Abbott*, 402.

² *Abbott on Shipping*, 400. *Cose v. Harden*, 4 East, 211.

stop them before they come to the hands of the vendee's factor, though the factor has the bill of lading indorsed to him by the vendee in his hands, and is under acceptances to the vendee on a general account between them. And, in such a case, where the factor became bankrupt, and the messenger under his commission, upon the arrival of the ship with the goods, went on board and seized them *after the agent of the vendor* had given notice to the captain to deliver the cargo to him; it was held that the vendor might maintain trover against the assignees for the goods.¹ The grounds, upon which the judgment of the court in this case was founded, were, that the bill of lading was indorsed and transmitted by the vendee to the factor, for the *express purpose* of enabling the factor to *sell* the goods,—without any reference to a loan or balance due to him from the vendee, and without any *specific pledge* of the cargo, or any particular appropriation of the bill of lading, to any specific draft or balance, (which, it was admitted, would have varied the rights of the parties,)—and that an indorsement of a bill of lading made by a vendee to a party, merely *as factor*, carried his rights no further, than if the bill of lading had been unindorsed. It was also agreed by the court, that where a *factor* is incapable, by his bankruptcy, of taking possession of a cargo previously consigned to him, his assignees, being incapable of performing the duties entrusted to the bankrupt, in respect of a *personal confidence* reposed in *him*, have no right to interpose, and prevent an unpaid vendor from stopping goods *in transitu*.² It is apprehended, however, that this case, if the factor had not become a bankrupt, (when the question, of the transfer of the *personal confidence* from the factor to his assignees, could not have been raised,) would now meet with a different decision under the 6 Geo. 4, c. 94, s. 2, inasmuch as the vendee, being in possession of the bill of lading, must under that act have been deemed to be the *true owner of the goods*, so as to give validity to any contract made with any person to dispose of them on his account; and though the indorsement of the bill of lading might have been made to the factor, merely *as factor*, yet as a bill of lading is now declared to be the *symbol of ownership* in the goods, so far as to render valid any contract for the disposal of them, the legal possession of the bill of lading, *even as factor*, would, unless his principal interfered, have drawn with it the right

¹ *Patten v. Thompson*, 5 M. & S. 350.

² 5 M. & S. 350.

to possess the goods, and to hold them as against all persons whatever, in virtue of his lien for the general balance due to him from his principal.

Right of factor to pledge.] Before the statutes¹ above referred to,—which have made as important alterations in the law of merchant and factor, as in that of consignor and consignee,—it was determined, that if goods were sent to a consignee *as factor*, he could not divest the consignor's right to stop them *in transitu*, by indorsing, or delivering over, the bill of lading as a *pledge*; ² for it was then considered, that an authority *to sell* the goods gave him no right *to pawn* them. But now, by the 6 Geo. 4, c. 94, s. 5, and 5 & 6 Vict. c. 39, any person may accept any goods, or bill of lading, or other document for delivery of goods, in *deposit or pledge* from any factor or agent, notwithstanding he has notice that the person pledging is a factor, or agent; so that the right of the consignor to stop *in transitu* is now subject to any lien which a third person has acquired by the factor of the consignor pledging the goods for valuable consideration. This new authority given to a factor will be more fully considered in a subsequent section, when we come to treat of a factor's lien.³

SECTION VIII.

Of Goods sent, but not accepted; and of Goods ordered, but not delivered.

The assignees are not entitled to goods delivered *by* the bankrupt before his bankruptcy, on a precedent consideration, although they may not be actually *accepted* by the other party until *after* the bankruptcy.

Goods not accepted, and returned.] And if goods are consigned to a bankrupt upon credit, who, being apprehensive of his own insolvency, but, before the commission of an act of bankruptcy, declines to accept them, and the consignor consents to receive them back,—the goods, in this case, will not pass to the assignees; and the court will presume a

¹ 6 Geo. 4, c. 94; and 5 & 6 Vict. c. 39; and see ante, 462.

² *Newsom v. Thornton*, 6 East, 17.

³ See post, sect. 9.

consent in the consignor to receive the goods back,¹ unless the contrary appears. So, where, after considerable dealings between the vendor and vendee, the latter (whilst some goods that had been consigned to him were still *in transitu*) in consequence of his distresses wrote to the vendor, to say that he was in falling circumstances, and that he would not apply for those goods; and the vendor, by return of post, answered the bankrupt's letter by saying, "If I find you an honest man, you shall have every indulgence from me," making no mention of the goods; but he immediately left Newcastle for London, and went to the wharf where the goods were lying, and claimed them of the wharfinger; it was held, under these circumstances, that, the contract being rescinded before the arrival of the goods, the vendor was entitled to have them delivered up,—and that free from any lien of the wharfinger for his *general balance* due from the vendee.² So, also, where goods were sold and actually delivered to the clerk of the vendee, and sent by him to the vendee's packer, to prepare them for being shipped to the vendee; and whilst they were in the packer's hands, the clerk received a letter from the vendee, *dated before the delivery of the goods*, saying that he was ruined, and adding, "If you have purchased any goods for my account, or if any orders are given out, let the persons have their goods back, and countermand all orders;" upon which the clerk showed this letter to the vendor, who agreed to take back the goods, though not until after they had been attached on the same day by some of the vendee's creditors; it was held, in this case, that the *property* in the goods revested in the vendor, so as to avoid the attachment; as the countermand of the purchase by the vendee was dated *before the delivery* of the goods, though not received and assented to by the vendor until after such delivery.³ So, where a purchaser who had ordered goods of a consignor, being in insolvent circumstances when the goods arrived at the wharf, desired an attorney to stop the delivery, who, the following day after the arrival of the goods, gave the wharfinger an order not to deliver them to the consignee, which order the consignor wrote to confirm, and on the following day the goods were seized in execution by a creditor of the purchaser; it was held that the contract was legally rescinded before the

¹ *Atkin v. Barwick*, 1 Str. 165.
10 Mod. 432. Fortesc. 353.

² *Richardson v. Goss*, 3 Bos. & P.
119; and see *Mills v. Ball*, 2 Bos.
& P. 457, and ante.

³ *Salle v. Field*, 5 T. R. 211; and
see *Graff v. Greffulhe*, 1 Camp. 89,
and ante, 448, et seq.

goods were seized by the execution creditor, and that the consignor was entitled to the goods.¹

But in all cases of a re-delivery of goods to a vendor, the determination of the vendee to reject them must be made *instantly*; for, if the goods are kept by the vendee some time after their delivery,—such, for instance, as a period of four months,² or even, in one case, of fourteen days,³—he cannot, when on the eve of bankruptcy, restore them to the vendor; for, though there might be no fraudulent concert between the parties, such a transaction would, in fact, amount to an undue preference of the vendor to the vendee's other creditors. Thus, where a vendee at Devizes was in the habit of receiving different parcels of wool from the vendor at Bristol, and the course of dealing was, that sometimes the wool was sent with, and sometimes without, any specific order, but the vendee had always an option to return each particular parcel, if he had no call for it; on the 14th of February the vendor, by order, sent the vendee thirteen bags of wool, which arrived on the 19th, and were then deposited in the vendee's warehouse with his other goods,—though he gave directions not to have them opened, or entered in his books, but only weighed off to see that they agreed with the invoice, as he knew that he was in embarrassed circumstances, and intended not to take them into the account of his stock, if in the event he found himself unable to go on; and on the 4th and 5th of March he returned the wools to the vendor, who consented on the 7th to receive them back, which was after an act of bankruptcy committed by the vendee; under these circumstances, it was held that the vendee, by keeping possession of the goods so long, had lost his option to return them, which ought to have been exercised immediately on the receipt of them; and the assignees of the vendee were declared to be entitled to the wools.⁴

And when the goods, after being delivered, are *once accepted* by the vendee, the latter cannot return them to the vendor, so as to give him any right as against the assignees of the vendee,—although the vendee has, in fact, committed an act of bankruptcy between the sale and the delivery of the goods.⁵ Nor can a vendor return goods so returned, after he has done any act to recognize the sale. As where a vendor instituted an attachment against the goods, *as the property of the vendee*,

¹ *Bartram v. Farebrother*, 4 Bing. 579.

⁴ *Ibid.*

² *Barnes v. Freeland*, 6 T. R. 80.

⁵ *Hanwell v. Hunt*, cited 5 T. R.

231.

³ *Neate v. Bull*, 2 East, 116.

the goods being then in the hands of the vendee's packer,—this was considered to be an election by the vendor not to rescind the contract, although the vendee actually wished to return the goods.¹ But a delivery order for wine in the London Docks, given by the vendor to the vendee, without anything more being charged, is not a sufficient acceptance of the wine to take the case out of the statute of frauds.²

Goods ordered, but not delivered.] But the assignees are not entitled to goods contracted to be bought by the bankrupt, in which he has not the right of *possession*, as well as the right of *property*. Thus, where a vendor sold to the bankrupt by contract various parcels of hops, part of which were weighed, and an account of the weights, together with *samples* only, was delivered to the bankrupt, who not paying for them at the usual time, according to the custom of the trade, the vendor gave him notice, that unless they were paid for by a certain day they would be resold; and the hops being not then paid for, the vendor resold a part with the consent of the bankrupt before his bankruptcy, and afterwards the residue without the assent either of the bankrupt or the assignees, but an account of the sale of the hops was delivered to the bankrupt, in which he was charged warehouse-room from the 30th August, and the assignees demanded the hops of the vendor, tendering the warehouse rent and other charges, and, upon his refusing to deliver them, brought *trover*; it was held that, under these circumstances, the assignees were not entitled to maintain *that species* of action to recover the value of the hops, notwithstanding the jury found that the defendant had not rescinded the contract of sale; for, in order to maintain *trover*, the party must have, not only a right of *property*, but also a right of *possession*; and although a vendee of goods may acquire a right of *property* by the contract of sale, yet he does not acquire the right of *possession* in the goods, until he pays or tenders³ the price. So, where the vendor received even 700*l.* in *part* of the price of goods bought by a bankrupt at certain credit, some of which were in the warehouses of other persons in the *vendor's name*, and *no notice* had been given to any of such persons to transfer them into the name of the bankrupt, but they remained after the contract of sale as they did before; in this case it was held, also, that the

¹ *Smith v. Field*, 5 T. R. 402.

² *Bloxham v. Sanders*, 4 B. & C.

³ *Bentall v. Burn*, 1 Ry. & M.
107.

911. *S. P. Miles v. Gorton*, 4 Tyr.
295. 2 Cr. & M. 504.

assignees could not maintain *trover* for them against the vendor, without tendering the remainder of the price.¹

So, goods which are ordered by a bankrupt to be made or manufactured—though he has even advanced money on account to the manufacturer equal to the value of the work and materials, and though the work is in fact completed—have been held not to pass to his assignees, unless the article in question has been *actually delivered* to him,—or, unless the manufacturer has done some act to express an *unequivocal assent*, that the general property should be considered as vested in the purchaser. Thus, where a trader entered into a contract with a barge-builder for a barge, and before the work was begun advanced to him money on account, to the amount, at last, of the value of the barge; and the barge was completed, and the trader's name even painted on the stern; but, before it was delivered, it was taken under an execution by another creditor of the builder; it was held that the assignees of the trader could not recover the barge in *trover* against the sheriff, on the principle, that a buyer acquires no property in a chattel, until it is both finished and delivered to him,²—and that painting the name upon the stern, only expressed an *intention* that the barge should belong to the trader, but did not pledge him *absolutely* to fulfil that intention.

So, an action will not lie by the assignees, as for goods bargained and sold by the bankrupt to the defendant, which the defendant, before the bankruptcy, refused to accept, and which continued in the possession of the bankrupt.³ But where the bankrupt had bargained for, and agreed to buy of the defendant, a quantity of linseed, to be delivered at a certain time, and at a certain price, it was held that the assignees might maintain a special action of *assumpsit* against the defendant, for not delivering the linseed pursuant to his contract.⁴

And where goods previously ordered of a manufacturer are not forwarded, or paid for, until the manufacturer has committed an act of bankruptcy, they may be recovered back by his assignees in an action of *trover* against the purchaser, notwithstanding the purchaser had even accepted a bill for a larger sum than the price of the goods—if the purchaser had notice of the act of bankruptcy,⁵ and there is no evidence of

¹ *Blaxham v. Morley*, *ibid.* 951.

⁴ *Gibson v. Carruthers*, 8 Mees.

² *Mucklow v. Mangles*, 1 Taunt.
318.

& W. 321.

⁵ See 2 & 3 Vict. c. 29.

³ *Atkinson v. Bell*, 8 B. & C. 277.

any *specific appropriation* of the bill to the payment of the price of the goods.¹

But when there is an *express appropriation* of payments made by the bankrupt (before the article purchased of him, or contracted for, is actually delivered) to the liquidation of the price of the *particular article* contracted for, then the property in it will pass to the purchaser, *after any act of transfer*, provided he has no notice of any act of bankruptcy. As, where a ship-builder contracted with B. to build a ship for him, for which B. was to pay, in the progress of the work, by four instalments, the two last to be payable when the ship was launched; and whilst the ship was building, she was measured, with the builder's privity, in order that B. might get her registered in his name; and the ship-builder for that purpose signed the *usual certificate* of her building, upon which the ship was *registered in B.'s name*, and on the same day the third instalment was paid; and after this, and before the ship was completed or launched, the ship-builder committed an act of bankruptcy; it was held, under these circumstances, that the legal effect of the ship-builder having signed the certificate, to enable B. to have the ship registered in his own name, was, to *vest* the general property in the ship in B., from the time when the registry was completed, subject to the ship-builder's lien for the fourth instalment; and that a rudder and cordage, also, which were not affixed to the ship, but which were made and bought by the ship-builder specifically for that purpose, were to be considered as part of the ship; and that none of this property was in the possession of the bankrupt as reputed owner.²

And in a subsequent case, where the circumstances were very similar, though not so strong against the reputed ownership of the bankrupt as in the last, it was held, that on the first instalment being paid without any certificate being signed by the ship-builder, to have the ship registered in the name of the purchaser,—the property in the portion of the ship then finished became vested in the purchaser, subject to the right of the builder to retain such portion for the purpose of completing the work, and earning the rest of the price; and that each material subsequently added became, as it was added, the property of the purchaser, as the general owner.³

¹ *Bishop v. Crawshaw*, 3 B. & C. 415. 5 D. & R. 279; and see *Hurst v. Gwynnap*, 2 Star. 306.

² *Woods v. Russell*, 5 B. & A. 942; and see per Holroyd, J., 3 B. & C.

419, who distinguishes this case from *Bishop v. Crawshaw*, ante.

³ *Clarke v. Spence*, 4 Ad. & E. 448.

But where B., a builder, contracted with A. to build a hotel for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments of corresponding dates; and A. was empowered, in case B. should become bankrupt, to take possession of the *work already done* by him, and to put an end to the agreement, and that A. should in such case pay B., or his assignees, only so much money as should be adjudged to be the value of the *work actually done and fixed* by B.; and after the works had proceeded for some time, B. became bankrupt, but before his bankruptcy, certain wooden sash-frames had been delivered by him on the premises, and returned to him for the purpose of having iron pullies belonging to A. affixed to them, and after the act of bankruptcy, but before the fiat, they were re-delivered to A.; it was held that the sash-frames had not passed to A. at the time of the bankruptcy, and that he was not entitled to retain them, as being *work already done*, they not having been fixed to the hotel; but that even if they were within that clause of the agreement, it would not bind the assignees, inasmuch as their right accrued in the bankruptcy, whereas the option of A. was not to be revived until after the bankruptcy.¹

SECTION IX.

Of Goods subject to a LIEN.

(And see ante, Chapter IX. Section 6, "*Of Equitable Mortgages*;" and post, Chapter XVII. on "*Set Off*.")

The right of the assignees does not divest a *legal, or equitable lien* of any party on the bankrupt's goods. This rule is founded upon the same principle as that which we have often had occasion to notice, viz. that the assignees are bound by all the equities by which the bankrupt himself was bound. A *lien*, in its legal sense, means a right to possess or retain anything then in the possession of the party, until a just and equitable claim, either *in respect of the thing itself*, or *against the owner of the thing generally*, is satisfied. In the first case it is denominated a *special*, in the last a *general*, lien.

¹ *Tripp v. Armitage*, 4 Mees. & W. 687; but see now the 2 & 3 Vict. c. 29, which substitutes the issuing of the fiat for the act of bankruptcy.

Nature and extent of a lien.] Lien subsists either by the common law, the usage of trade, or agreement between the parties; and as the convenience of commerce, and natural justice, are much in favour of this species of claim, the courts have, in all cases where a question of lien has been agitated, invariably shown a disposition leaning towards the person making the claim. They will, therefore, often imply a contract of lien, either from the general course of trade, or from the nature of the particular mode of dealing between the parties. There can be no lien, however, unless the goods, in respect of which the lien is claimed, have *actually* come to the possession of the party before the bankruptcy of the owner;¹ for a *constructive* possession is not sufficient.² Therefore, where A. consigned a cargo to B., with a direction to pay to C. out of the proceeds a sum of money, and wrote to C. to that effect; it was held, that C. in this case had no lien on the proceeds.³

But where a party would have a lien upon an article in his own possession, he has the same lien upon it, where it is in the possession of a third person, who may be considered as his agent. Thus, where A. having two pipes of wine lying in a bonded warehouse in the name of B., who had given bond for the duties, sold them to C., and gave him a delivery order, it being agreed that C. should pay the duties; but when they became payable, B. was called upon and paid them, and took away the wine to his own cellar, and A. afterwards repaid the amount of the duties to B.; and C., who had never required B. to transfer the wine to his name, afterwards took away one pipe, and was charged with and paid warehouse rent to B., and then became bankrupt, when his assignees demanded the other pipe; it was held, that B., at A.'s request, was entitled to keep it until the duties were repaid.⁴

Where an article is deposited with a party as a security for effecting a *particular purpose*, he has no lien on it for any *other purpose*. Thus, where deeds were deposited for the purpose of obtaining *future credit*, it was held, that the person with whom they were deposited had no lien upon them for what was due to him in respect of monies *previously advanced*.⁵

Nor can any one acquire a greater lien than the interest

¹ *Patten v. Thompson*, 5 M. & S. 350. *Nicholls v. Glent*, 3 Pri. 547.

Kinloch v. Craig, 3 T. R. 119. Ex 372.

parte Wucherer, 2 D. & C. 27.

² *Ibid. Taylor v. Robinson*, 8 Taunt. 648.

³ *Ex parte Haywood*, 2 Rose, 355.

⁴ *Winks v. Hassall*, 9 B. & C.

⁵ *Mountford v. Blake*, 1 Turn.

which the person pledging or depositing the property possesses in it himself. Therefore, where a tenant for life pledged plate with a pawnbroker, the latter was held to have no lien upon it, after the death of the tenant for life, against the remainder-man, although the pawnbroker had no notice of the particular limitations of the settlement,¹ which created the tenancy for life. So, a person, who has no right whatever to the property himself, can confer no lien by pledging it with another, although the party *bonâ fide* advances money upon it, without notice of the wrongful possession of the party pledging it.²

Where a party has a lien on an article deposited with him, he has no right to sell it in satisfaction of his lien, without authority of the owner; and if he does so, he is liable to refund the whole amount of the proceeds to the owner, or his assignees, in an action for money had and received.³

Equitable lien, generally.] In cases of an *equitable lien on goods* generally, that is, where the real and beneficial interest in property is in a creditor at the time of his debtor's bankruptcy, though the legal estate is in the bankrupt, the assignees are subject to the same equities as the bankrupt himself, and will not, in such a case, be permitted to take advantage of the relation to the act of bankruptcy. Thus, where a trader makes an assignment of goods at sea, as a collateral security for a debt, and then commits an act of bankruptcy, and afterwards indorses the bill of lading to the creditor, the creditor is entitled to the goods, as against the assignees.⁴ But where the goods, upon which the creditor of a trader (*before* an act of bankruptcy committed by him) had an equitable lien, are no longer in existence, such lien will not, in that case, attach upon *other* goods substituted for the former by the trader, *after* he had committed an act of bankruptcy.⁵ Therefore, where a merchant pledged for value the bills of lading of an expected cargo, and his agents abroad (without his knowledge) disposed of part of the cargo; after which, having committed an act of bankruptcy, he induced his agents to replace the goods by others, and then sent the bills of lading of the substituted goods to the

¹ *Hoare v. Parker*, 2 T. R. 376; and see *ex parte Nesbitt*, 2 Sch. & Lef. 279.

² *Hooper v. Ramsbottom*, 1 Camp. 121.

³ *Clark v. Gilbert*, 2 Bing. N. C. 245. 3 Scott, 520.

⁴ *Lempriere v. Pasley*, 2 T. R. 485. *Belcher v. Oldfield*, 6 Bing. N. C. 102; and see post, Chap. xvi. "Relation."

⁵ *Meyer v. Sharpe*, 5 Taunt. 74.

pawnees of the former cargo, in order to make good their security; it was held, that the assignees might recover the substituted goods in trover against the pawnees.¹ But the pawnees would now, under the 2 & 3 Vict. c. 29, have a good title to the goods, unless they had notice of the act of bankruptcy.

An agreement by the bankrupt to transfer, not any specific property but some undefined portion of goods to be afterwards selected, upon an uncertain event, will not create a lien upon any portion of the bankrupt's property, but the whole will pass to the assignees. Thus, where A., who resided at Liverpool, was in the habit of making consignments of goods to B., his agent in South America, for sale, on the faith of and against which consignments A. drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of C., A.'s correspondent in London, and some of the bills so indorsed having been refused acceptance by the agent, C. requested that A. would order his agent, in case he did not pay his drafts, immediately to hand over to C.'s agent *such property as he had of A.'s*, of an equivalent value to the bills *that should not be paid by him*, which A. agreed to do, but became bankrupt before his order to transfer the goods reached South America; it was held, that the bargain between A. and C. did not operate as a legal or equitable assignment of the property in A.'s goods held by B., his agent, but that they remained the property of A. at the time of his bankruptcy, and passed to his assignees.²

And where a party has incurred charges in respect of goods, the delivery of which to him by the bankrupt amounts to a fraudulent preference, he has no lien on the goods for these charges, as against the assignees.³

Where one of several residuary legatees, with the concurrence of the others, induced the executors to sell out stock forming part of the residuary estate, and to lend him the proceeds, on his executing to them a warrant of attorney, and depositing certain title-deeds as a security for the replacement of the stock; it was held, that the executors had, on his bankruptcy, a lien on the share.⁴

A lien upon goods, however, exists only so long as the

¹ *Meyer v. Sharpe*, 5 Taunt. 74.

³ *Ayling v. Williams*, 5 C. & P.

² *Carvalho v. Burn*, 4 B. & Ad.

399.

382. Confirmed on error in Exchequer Chamber, 1 Ad. & E. 883, and overruling *Burn v. Carvalho*, 7 Sim. 109.

⁴ *Ex parte Makins*, 2 M. D. & D. 508.

party continues in possession; for if he once relinquishes possession, the rule is, that the lien is at an end.¹ There are, however, some exceptions to this rule; for where a party is *forcibly* or *fraudulently* turned out of possession of the property, the lien will revive when he *recovers* possession;² and the like in some cases, even where he voluntarily quits possession,—as, where he delivers it up to the owner upon the faith of an assignment, which afterwards turns out to be invalid.³ So, where a party, having an equitable mortgage, delivered up the deeds upon the sale of the estate, and the sale was afterwards set aside,⁴—or where he delivered up a lease to be sold under an execution, and the execution was invalidated by a prior act of bankruptcy,⁵—he was held, in neither of these cases, to have lost his lien. In one case, also, where an insurance broker, having parted with the possession of a policy upon which he had a lien, obtained from his principal the policy again, upon pretence of receiving the average; it was held, that the lien revived by thus regaining the possession:⁶ though, perhaps, there may be some doubt as to the correctness of this decision, as the re-delivery of an article, in order to revive a lien, ought to be strictly for the *same purposes* for which it was originally delivered.⁷ If, however, the commodity upon which the lien attaches be of a *perishable* nature, the party may, in that case, safely part with it to the owner, upon a special agreement with him that the lien shall await the event of a legal determination.⁸

When waived, or lost.] A lien, also, may be waived or abandoned by the laches of the party claiming it,⁹ or by a special agreement, which contains some term *inconsistent with the right to retain*, as where the parties contract for a *particular time* and mode of payment; but merely *fixing the price* of labour to be done to any particular article or commodity, is no abandonment or waiver of any lien upon it.¹⁰ If a security is taken for a debt, in respect of which the

¹ *Kruger v. Wilcox*, Amb. 252.
² *Sweet v. Pym*, 1 East, 4.

³ *Ex parte Cheesman*, 2 Eden, Rep. 181. *Wallace v. Woodgate*, 1 Ry. & M. 193.

⁴ *Brown v. Hankey*, 2 T. R. 113.

⁵ *Ex parte Morgan*, 12 Ves. 6.

⁶ *Ex parte Doughty*, 1 Mont. Dig. 493.

⁷ *Whitehead v. Vaughan*, 1 C. B. L. 547.

⁷ And see 2 Christ. B. L. 142.

⁸ 1 Mont. Dig. 492. *Whitaker on Lien*, 73.

⁹ *Ex parte Douglas*, 3 D. & C. 310.

¹⁰ *Chase v. Westmore*, 5 M. & S. 186, by which some of the older cases on this branch of the subject are overruled. See Lord Ellenborough's judgment.

party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone.¹ And where the owner of a ship, having a lien on the cargo until the delivery of good and *approved* bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it; such negotiation was held to be an *approval* of the bill, and a relinquishment of his lien.² And where a claim is made to retain the goods (when they are demanded) on a *different ground*, without making any mention of the lien, the party has been held to have abandoned his lien;³ but a simple refusal to give up the property, accompanied with the observation of the party, that he "might as well give up every transaction of his life," does not amount to such⁴ abandonment. Where, however, a party, having a lien on goods, causes them to be taken in execution at his own suit, he thereby loses his lien, although the goods are sold to him under the execution, and are never removed off the premises.⁵

A creditor, having a lien on property in his hands for the amount of his debt, waives his lien, if he proves the whole amount of his debt,⁶ or even obtains an order to prove it,⁷ and will in either of such cases be directed, on petition, to deliver up the property to the assignees.

As to how far a *delivery of part* of the goods will divest the lien of the vendor upon the residue, see ante, "Stoppage in Transitu."⁸

Having thus endeavoured to explain generally the nature and legal effect of a *lien*, it is proposed now to enumerate those persons who, by the usage of trade, or by custom recognized by law, are considered as having a *general* or a *particular* lien, that is, a right to retain property, either for a *general balance* due from the owner, or for work done, or expenses incurred in respect of the *specific article* retained.

Factor's lien.] A *factor* has a lien upon *all* the property of his principal in his hands,—every thing in his possession

¹ *Hewison v. Guthrie*, 2 Bing. N. C. 755. 3 Scott, 298.

² *Horncastle v. Farran*, 2 Star. 599. 3 B. & A. 497.

³ *Boardman v. Sill*, 1 Camp. 410, n.

⁴ *White v. Gainer*, 2 Bing. 23.

⁵ *Jacobs v. Latour*, 5 Bing. 130.

⁶ *Ex parte Solomon*, 1 G. & J.

25.

⁷ *Ex parte Hornby*, Buck, 351.

⁸ *Ante*, 505. See also *ex parte Gwynne*, 12 Ves. 379, post.

being construed to be a pledge, not only for incidental charges, but for the *general balance* due to him.¹ And he has a lien, also, upon the price of goods sold by him as factor, as well as upon the goods themselves;² which lien is available even against a claim of the Crown.³ Nor is it any objection to a factor's lien, that he has advanced money to his principal, or accepted bills drawn on him to the extent of the value⁴ of the goods, provided the goods come to his hands before the act of bankruptcy of the principal;⁵ or that he has made an express agreement to pay over the whole proceeds of goods sold by him to his principal.⁶ But a factor's right to a *general* lien will not affect property delivered to him for a *special purpose*;⁷ and he has no lien for a debt due to him *before* he became a factor.⁸ Where a factor, also, by his bankruptcy becomes incapable of taking possession of goods consigned to him, his assignees have no right to take possession; for the consignment is made to the factor, in respect of a *personal confidence* reposed in him for the performance of those duties, which his principal never intended should be executed by *other* persons.⁹

Right to pledge.] A *factor*, who, from the very nature of his employment, has only the power given him by his principal to *sell* goods entrusted to his care, was always considered in law to have no authority to *pledge*, and could not therefore transfer his lien, as against his principal, to a third person, even though that person had no knowledge that he was only a factor;¹⁰ unless, indeed, the factor (by consent of his principal) exhibited himself to the world as owner.¹¹ The law has, however, (as has been before observed,) been materially altered in this respect by the 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, for the professed purpose of affording

¹ *Kruger v. Wilcox*, Amb. 252. *Goding v. London Assurance Company*, Burr. 494. *Foxcroft v. Devonshire*, 2 Burr. 936. *Hammond v. Barclay*, 2 East, 227. Ex parte *Good*, 2 Dea. 389.

² *Drinkwater v. Goodwin*, Cowp. 251. *Hudson v. Granger*, 5 B. & A. 27.

³ *Rez v. Lee*, 6 Pri. 369.

⁴ *Ibid.* *Foxcroft v. Devonshire*, *supra*.

⁵ *Copeland v. Stein*, 8 T. R. 199.

⁶ *M'Gillivray v. Sienson*, 9 Dow. & Ry. 35.

⁷ *Walker v. Birch*, 6 T. R. 258. *Burn v. Brown*, 2 Star. 272.

⁸ *Houghton v. Matthews*, 3 B. & P. 485.

⁹ *Patten v. Thompson*, 5 M. & S. 361.

¹⁰ *Paterson v. Tash*, Str. 1178. *Martini v. Coles*, 1 M. & S. 140. *Daubigny v. Duval*, 5 T. R. 604. *Shipley v. Kymer*, 1 M. & S. 484.

¹¹ *De Leira v. Eduards*, cit. 1 M. & S. 147.

better protection to merchants and others entering into contracts with factors or agents.

By the first of these statutes, (the 6 Geo. 4, c. 94,) it is enacted, that any person entrusted, for the purpose of consignment or sale, with any goods, and shipping them in *his own name*, and any person in whose name any goods shall be shipped, shall be deemed and taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon for advances made to the shipper, provided the consignee has no notice, by the bill of lading or otherwise, that the shipper is not the actual and *bonâ fide* owner. And the person, in whose name such goods are shipped, shall be taken to be entrusted therewith for consignment or sale, unless the contrary shall be made to appear by bill of discovery, or otherwise, or be shown in evidence by any person disputing the fact. And by the 5 & 6 Vict. c. 39, s. 1, any agent entrusted with the possession of goods, or of the documents of title to goods, is to be deemed the owner of them, so far as to give validity to any contract by way of pledge, lien, or security *bonâ fide* made with such agent, as well for any original advance upon the security of such goods or documents, as also for any further or continuing advance; and such contract is declared to be binding upon the owner of the goods, notwithstanding the person claiming the pledge or lien has notice that the person with whom the contract is made is only an agent.

By section 2, where any such contract is made in consideration of the delivery to such agent of any other goods, or documents of title, or negotiable security, upon which the person so delivering up the same had at the time a valid lien for a previous advance by virtue of some contract made with such agent, such contract of exchange, if *bonâ fide*, is to be deemed as effectual as any contract made in consideration of an advance; but the lien thus acquired upon the goods or documents deposited in exchange will not extend beyond the value of the goods or documents delivered up and exchanged.

But, by section 3, only such loans, advances, and exchanges are protected, as are made *bonâ fide*, and without notice that the agent has not authority to make such contract, or that he is acting *malâ fide* against the owner of the goods; nor is any lien protected in respect of any antecedent debt owing from the agent to the person receiving such pledge, nor is the agent authorized in deviating from any express orders received from the owner. And by section 5, the agent's civil responsibility for any breach of duty or contract is not only (by section 5) deemed to be not diminished;

but by section 6, if any agent, without the authority of his principal, for his own benefit, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title, by way of pledge, lien, or security, or accept any advance on the faith of any contract for that purpose; he is guilty of a misdemeanor, punishable with transportation for fourteen years.

By section 6, the owner may redeem the goods or documents pledged, at any time before the goods shall have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon satisfaction of the agent's lien as against the owner; and the owner may recover from the party with whom the pledge is made, any balance, after deducting the amount of his lien on the goods pledged. And in case of the bankruptcy of any agent, the owner of any goods so redeemed may, in respect of the sum paid by him for redemption, be held to have paid such sum for the use of the agent before his bankruptcy; or if the goods shall not be so redeemed, the owner is to be deemed a creditor of the agent for the value of the goods at the time of the pledge, and is entitled, in either case, to prove for, or set off the sum so paid, or the value of the goods.

Before this last statute, the agent could (under the 6 Geo. 4, c. 94, s. 5) only transfer to the party to whom he pledged the goods such lien as he himself possessed at the time of the deposit or pledge.¹

Bankers.] A banker has, like a factor, a *general* lien upon all the negotiable securities in his hands belonging to his customer, for his general balance; unless, indeed, there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule;² as where a customer deposited a lease with his bankers, without stating for what purpose it was left, in which case it was held, that they had no lien on it for their general balance.³

Where customers drew checks on their bankers, with whom their accounts were already overdrawn, and paid away the checks which came to the hands of other bankers, who remitted the checks to the first bankers in a printed

¹ *Fletcher v. Heath*, 7 B. & C. 517. *v. Perkins*, 9 East, 12. *Bolland v. Bygrave*, 1 Ryan & M. 271; and see ante, p. 429.

² *Davis v. Bowsher*, 5 T. R. 488.

Jourdaine v. Lefevre, 1 Esp. 66.

Bent v. Puller, 5 T. R. 494. *Giles*

³ *Lucas v. Dorrien*, 7 Taunt. 164. 1 Moore, 29.

circular, desiring the amount of them to be paid to the London correspondents of the second bankers; but, notwithstanding this circular, the custom between the bankers was to pay one another's checks, so far as circumstances would permit, by remittances of notes of the bankers sending the checks directly to those bankers, the understanding being that the checks should be paid on the day on which they were received, or the day following, either by such remittances, or by remittances according to the direction of the circular; and the first bankers gave the second credit in their books for the amount of checks, but became bankrupt three days after receiving them, and without having made any payment or remittance in respect of them, knowing at the time of receiving the checks that bankruptcy was inevitable, and the assignees obtained payment from the customers of the full amount of the checks; it was held, that the second bankers were entitled to payment in full of the same amount out of the bankrupt's estate.¹

And where a *cestui que trust*, entitled to monies payable out of a fund in the hands of trustees, was indebted to his bankers in a large amount, and, in consideration of not being pressed to reduce the amount, he agreed to give the bankers a lien on the monies coming to him out of the trust fund, and therefore addressed a note to one of the trustees, authorizing him to pay to the credit of the account of the *cestui que trust* at the bank, the monies payable to him out of the trust fund; and the trustee was apprised of the arrangement between the parties; it was held, on the bankruptcy of the *cestui que trust*, that the bankers had a good lien on the fund, and that the authority given by the note was not countermandable.²

An *insurance broker*, also, has been held to have a *general* lien on all policies in his hands; and though he parts with the possession of a policy, yet if it come again into his hands, the lien revives.³ Before the 5 & 6 Vict. c. 39, it was held, that if a broker knew that the person who employed him to effect an insurance was an agent, and not the principal, the broker had then (in the event of the agent's bankruptcy) no lien upon the policy for any *general* balance due to him from the agent, but only for the charges and expenses of effecting that particular policy;⁴ but it is apprehended, under the provisions of that statute, it would be determined other-

¹ Ex parte Cole, 3 M. D. & D. 189.

⁴ Mauns v. Henderson, 1 East,

² Ex parte Stewart, 3 M. D. & D. 265.

334. Snook v. Davidson, 2 Camp. 218.

³ Whitehead v. Vaughan, 1 C. B. L. 129. Park v. Carter, *ibid*.

wise. If a broker, however, had *no notice* that the policy was not on account of the person from whom he received the order, he had then always a lien upon it for his general balance due from such person, and also a right to apply to the satisfaction of that balance money received upon the policy, as well after as before notice that it belonged to a third person; but if, under these circumstances, *after* notice he pays over the surplus to the agent, he will then be liable to repay it to the principal.¹

A *packer* may, from the *mode of dealing* with his employer, be in the nature of a factor, and entitled, therefore, to a lien upon all goods in his hands, not only for the price of packing, but also for any other debts owing to him.²

So, a *wharfinger* has a *general* lien upon all goods deposited at his wharf, and left under his³ care, in respect of wharfinger; but not for *landing, weighing, delivery* or *warehouse rent*.⁴ But where the wharfage due upon goods imported was, by the course of dealing between the parties, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not, and the goods were before Christmas sold to A., and after Christmas the merchant-importer became bankrupt; it was held in this case, that the wharfinger had no lien on the goods against A. for the wharfage, inasmuch as the course of dealing between the parties was inconsistent with any right to retain.⁵

A *fuller*, by the custom of the trade at Exeter, has a lien upon goods in his possession, sent to him by a clothier to be fulled, for a *general* balance due to him.⁶ But, generally, a fuller has only a lien for work done on the particular cloth in his possession.⁷

And where a fuller was employed by H. & Co., to scribble and full woollens and cloths, under a stipulation, that "all goods on hand" should be subject to a lien for a general balance; and H. & Co. kept a quantity of oil and dye-woods on the defendant's premises,—the oil being there for the purpose of being used as required by the fuller's servants in the process of scribbling, but kept locked up and delivered out in small quantities by a servant of H. & Co.,—and the

¹ *Mann v. Forrester*, 4 Camp. 60.

² *Ex parte Deeze*, 1 Atk. 228. *Green v. Farmer*, 4 Burr. 2222.

³ *Naylor v. Mangles*, 1 Esp. 109. *Spears v. Hartley*, 3 Esp. 81. *Richardson v. Goss*, 3 B. & P. 124.

⁴ *Holderness v. Collinson*, 7 B. & C. 212.

⁵ *Crawshaw v. Homfray*, 4 B. & A. 50.

⁶ *Sweet v. Pym*, 1 East, 4.

⁷ *Rose v. Hart*, 8 Taunt. 499. 2 Moore, 547.

dye-woods being kept there for the purpose of being used by H. & Co. themselves in dying the wools, in an intermediate stage of the process of scribbling; it was held, that neither the oil nor the dye-woods were subject to the lien.¹

So, also, a *dyer* has a lien for dying the specific goods, but no further;² though, from the usage of the trade in the place or district where he carries on his business, his right *may* be extended to a lien for his *general balance*.³ And, where an agreement was entered into by a number of dyers at a public meeting, that they would not receive any more goods to be dyed, except on condition that they should respectively have a lien on those goods for their general balance; it was held, that any one, who after notice of such agreement delivered goods to any of those dyers, was to be taken as assenting to their terms, and, consequently, could not demand goods so delivered, without paying the balance of his general⁴ account.

A *printer* employed to print certain numbers of an entire work, though not all consecutive numbers, has a lien upon the copies not delivered for his *general balance* due for printing the whole of the work.⁵

But it has been ruled, that a *stereotype printer*, which is a modern trade, has not, without strong evidence of the fact, a general lien on stereotype plates not manufactured by himself, but put into his hands to print from them.⁶

So, a *calico printer* has a *general* lien upon the linen in his possession, not only for the price of printing the particular linens, but also for the price of printing others, which have been previously delivered to him.⁷

A *mill*, however, has only a lien upon flour and sacks in his possession, for the price of grinding the particular quantity of corn of which that flour is composed, but no⁸ further.

A *common carrier* is not entitled to a lien for a *general balance*, upon goods delivered to him for carriage, unless

¹ *Cumpston v. Haigh*, 2 Bing. N. C. 449. 2 Scott, 684.

² *Green v. Farmer*, 1 Bl. 651. *Bennett v. Johnson*, 2 Chitt. Ca. temp. Mansfield, 456.

³ *Saville v. Barchard*, 4 Esp. 53. *Humphreys v. Partridge*, Mont. B. L. App. 18. *Close v. Waterhouse*, 6 T. R. 523, in note. The places, where this usage has been recognized, are London (4 Esp. 53), Gloucestershire (Mont. App. 18),

and some particular district in the West of England, per Gibbs, C. J., 8 Taunt. 500.

⁴ *Kirkman v. Shawcross*, 6 T. R. 14.

⁵ *Blake v. Nicholson*, 3 M. & S. 167.

⁶ *Bleaden v. Hancock*, Mood. & M. 465.

⁷ *Ex parte Andrews*, 1 C. B. L. 429. *Weldon v. Gould*, 3 Esp. 268.

⁸ *Ex parte Ockenden*, 1 Atk. 235.

upon special agreement,¹ but only for the carriage of the particular goods.

So, an *innkeeper* has only a *particular* lien on the goods of his guest.²

But a *livery stable-keeper*, it seems, has no lien, unless by special agreement.³

On a ship.] With respect to the particular lien attaching on a *ship*, for repairs or provisions, the person repairing has only a lien upon her for those expenses, as long as she remains in his possession, the lien ceasing when possession is parted with.⁴ But, where a shipwright, by the usage of trade (like that prevailing in the river Thames), gives a certain *credit* to the ship-owner for the amount of the repairs, Lord Ellenborough held, that in this case he had no lien, without an express agreement for that purpose; for that the lien of an artificer was wholly inconsistent with a *dealing on credit*, and could only subsist, where payment was to be made the moment the work was completed, and where there was an immediate right of action for the debt.⁵ If, however, the repairs or the refitting take place in a port *abroad*, then, for the necessity and encouragement of trade, the lien continues, though the ship is out of the possession of the party;⁶ for, by the maritime law, any contract of the master for repairs or provisions, amounts to an hypothecation of the ship.⁷ But, where bills of exchange were given by the captain for advances made to him abroad, which were not precisely shown to have been appropriated for the use of the ship, and the bills did not appear upon the face of them to have been drawn for the purposes of the ship; such bills were held, *prima facie*, evidence against the inference of the advances being made on the credit of the ship itself.⁸ And,

¹ *Kirkman v. Shawcross*, *supra*.
Aspinall v. Pickford, 3 Bos. & P. 44.
Oppenheim v. Russell, *ibid.* 42.
Rushfield v. Hadfield, 6 East, 519.
7 East, 224.

² *Yelv.* 67. Str. 556.

³ *Wallace v. Woodgate*, 1 Ry. & M. 193. *Quære*, as to a trainer of race-horses. *Jacobs v. Latour*, 5 Bing. 130.

⁴ *Watkinson v. Bernardiston*, 2 P. W. 367. Ex parte *Shank*, 1 Atk. 234. *Wilkins v. Carmichael*, Doug. 97. Ex parte *Bland*, 2 Rose, 91. *Woods v. Russell*, 5 B. & A. 942. Ex

parte *Hill*, 1 Mad. 61. *Franklin v. Hosier*, 4 B. & A. 341.

⁵ *Raiff v. Mitchell*, 4 Camp. 146.

⁶ Ex parte *Shank*, 1 Atk. 234. *Watkinson v. Bernardiston*, *supra*, and the cases there cited in note.

⁷ *Justin v. Ballam*, 1 Salk. 34.

⁸ Ex parte *Halkett*, 2 Rose, 239. 19 Ves. 474. 2 Rose, 194. 3 V. & B. 135. Lord Eldon is reported to have said in this case, that a ship may be bound by bill of sale, but not by *parol*;—from which the reporter has inferred generally, that no lien on a ship can be created by

though the master can hypothecate a ship for repairs done abroad, he has no lien *himself* on the ship for money expended by him in respect of those repairs; for it does not follow, because others through him acquire a lien on the ship, that therefore he himself has such a lien,—a lien being frequently derived through the act of a servant, which the servant himself does not possess.¹ Neither has the master any lien on the ship for his wages; his case, in this respect, being distinguished from that of all other persons belonging to the ship.² And, as a lien on the *freight* is always consequential to a lien on the ship, he has also no lien on the freight, either for his wages, or disbursements on account of the ship.³ But the consignee of a ship for sale, to whom the ship and register are delivered, has a lien upon her, for money expended for repairs and seamen's wages.⁴

Ship-owner.] The *owner of a ship* has a lien on the cargo for the freight; but his lien is confined to the amount of freight for goods actually carried, and cannot be extended to his claim for what is called *dead freight*, that is, an unliquidated compensation for the loss of freight, by reason of the freighter not putting a full cargo on board.⁵ And where the parties to a charter-party mutually bound themselves, especially the ship-owners, the ship, tackle, &c., and the freighter, the goods to be put on board, in a penal sum for the performance of the conditions of the charter-party; yet this was held not to give the owner a lien on the cargo for dead freight, or demurrage; for, as the clause was intended to be mutually obligatory, and the freighter had in that case no lien on the ship, the court said, it would be therefore absurd to hold, that the clause gave a lien on one side, without the like remedy on the other.⁶ Where the owner also has by the contract of charter, in letting the ship to freight, *parted with the actual possession* of the ship, he can then have no lien for the freight on the cargo; as the cargo,

parol; but this position would be contrary to all the cases, which decide, that a party, furnishing the ship with repairs and necessaries abroad, has a lien upon her, without any instrument of express hypothecation. 1 Atk. 234. 2 P.Wms. 367. 1 Salk. 34; and see *Hussey v. Christie*, 13 Ves. 599.

¹ *Wilkins v. Carmichael*, Doug.

101. *Hussey v. Christie*, 9 East, 426. Abbott on Shipping, 419.

² *Wilkins v. Carmichael*, supra.

³ *Smith v. Plummer*, 1 B. & A.

575. *Atkinson v. Cotesworth*, 3 B. & C. 647.

⁴ *Hammonds v. Barclay*, 2 East, 227.

⁵ *Phillips v. Rodie*, 15 East, 547.

⁶ *Birley v. Gladstone*, 3 M. & S. 205.

in this case, was never in his possession.¹ But, where there are no express words of demise in the charter-party of the ship itself, the mere occupation of the ship by the freighter will not prevent the owner from being considered still in the possession of the ship so as to preserve his lien.² Part-owners of a ship are tenants in common, and not joint-tenants; and therefore, if one becomes a bankrupt, being indebted to the other owners for outfit, freight, and as managing owner, they have no lien on his share for their debt; but his share passes to the creditors under the bankruptcy.³ And where the managing owner of a ship chartered by the East India Company received the warrants for the freight, and paid them into a banker's in his own name, drawing checks from time to time for various sums out of the proceeds, part of which were applied for the use of the ship, and part for other purposes; it was held that the other part-owners had no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors.⁴

Vendors.] A vendor of real property is, as we have seen,⁵ entitled to an *equitable* lien upon an estate sold, for so much of the purchase-money as remains unpaid, unless the vendee can show that the lien has been clearly relinquished by the vendor.⁶ For, though the conveyance of the property states (contrary to the fact) that the purchase-money is paid, and the estate passes by the conveyance at law, it does not pass, *in equity*, until actual payment, notwithstanding even a receipt for the money is indorsed upon the deed.⁷ This lien, however, is held to be abandoned, by the vendor's acceptance of a security for the purchase-money from some other person, when it appears that credit was given *exclusively* to such person. But the vendor's lien is not discharged by taking bills of exchange, or other *negotiable* securities, for the purchase-money payable by other persons; as these are considered, not so much in the

¹ *Vallejo v. Wheeler*, Cowp. 143.
Trinity House v. Clark, 4 M. & S.
 228. *Hutton v. Briggs*, 2 Marsh.
 339. 7 Taunt. 114.

² *Tate v. Meek*, 2 Moore, 278.
Yates v. Railston, *ibid.* 294. *Sa-*
ville v. Campion, 2 B. & A. 503.

³ *Ex parte Young*, 2 Ves. & B.
 242. *Ex parte Harrison*, 2 Rose,
 76; but see *Doddington v. Hallett*,
 1 Ves. 497, *contra*.

⁴ *Ex parte Gribble*, 3 D. & C. 339.

⁵ *Ante*, page 209.

⁶ *Chapman v. Turner*, 1 Vern.
 267. *Austin v. Halsey*, 6 Ves. 475.
Hughes v. Kearney, 1 Sch. & Lef.
 132. *Mackreth v. Symmons*, 15 Ves.
 329; and see *Blackburn v. Gregson*,
 1 Bro. 424, Eden's ed. (note.)

⁷ *Winter v. Lord Anson*, 1 Sim.
 & S. 444.

nature of a security, as of a mode of payment.¹ Where, however, there was a *covenant* between the vendor and purchaser, that the purchase-money should be paid within two years after the re-sale of the premises; this was held to discharge the vendor's lien, as it afforded evidence that the vendor meant to rely on the *personal* security of the purchaser.² And where a *bond* was executed by the vendee for payment of the purchase-money and interest at the death of the vendor, it was decided, that the vendor had no lien on the estate; for that when the bond was executed, the estate passed to the vendee in equity, as well as at law.³

In the case of the *sale of a lease and furniture*, though the vendors had brought an action and obtained judgment against the purchaser for the amount of the purchase-money, yet, as possession had not been actually delivered up, Lord Eldon thought that the vendors had a lien upon the furniture as well as the house, as against the assignees of the purchaser.⁴ But, where timber felled was sold to a trader, who became a bankrupt after having taken away part, Lord Eldon considered it doubtful whether the vendor had a lien for the purchase-money upon the remainder, as it was questionable whether such a delivery had not taken place as was sufficient to vest the whole of the timber in the purchaser.⁵ And where the plaintiff sold to J. trees lying on land occupied by B., and J. was to have the power of removing them when he pleased, and the trees having been marked by J., the cubical contents of each ascertained, and some of them having been taken away; it was held that the transfer of the whole was complete, and that, upon J.'s bankruptcy, the plaintiff could not enforce any lien on the trees, notwithstanding they remained on the land of B., and the sum total of the cubical contents had not been ascertained.⁶

A vendor of goods has a lien on them, while they remain in his possession, for any part of the unpaid purchase-money.⁷

But the general lien of a *vendor of goods*, for the amount of the price, exists only during such time as the goods are not actually delivered to the vendee. There is one exception,

¹ *Grant v. Mills*, 2 Ves. & B. 306. Ex parte *Loaring*, 2 Rose, 79. Ex parte *Peake*, 1 Mad. 346; and see *Sugden V. & P.* ch. xli.

² Ex parte *Parkes*, 1 G. & J. 228. ³ *Winter v. Lord Anson*, supra; and see *Cood v. Pollard*, 9 Pri. 544. 10 Pri. 109.

⁴ Ex parte *Lord Seaforth*, 1 Rose, 306.

⁵ Ex parte *Gwynne*, 12 Ves. 379.

⁶ *Tansley v. Turner*, 2 Bing. N.C. 151.

⁷ Ex parte *Twining*, 1 M. D. & D. 691.

however, to this general position, and that is in the case of fraud on the part of the vendee. Thus, where a vendee under a contract to pay for goods on delivery, obtains possession of them by giving a check, which is afterwards dishonoured, and then becomes bankrupt; it was held that his assignees gained no property in the goods, if, at the time of giving the check, he had *no reasonable ground to expect* that it would be paid.¹ What acts will amount to a delivery to the vendee, so as to divest the vendor of his lien, have been already considered in treating of the right of "Stoppage in Transitu."²

Bill-holders.] The indorsee of a bill has a lien upon goods deposited by the drawer with the acceptor, as a specific security for payment of the bill.³

And where A. procured goods, which he agreed with B. & C. should be shipped on the joint adventure of the three, and then drew bills on B. & C. for the amount of the costs of the goods, which they accepted, A. engaging to renew the bills until the return-proceeds for the goods were received, B. & C. managing the shipment, and directing the consignee to forward the amount of the return-sales to themselves; and A. afterwards applied to D. to discount two of these bills, and, to induce him to do so, undertook that the proceeds of the goods should be applied in liquidation of the bills, which undertaking D., after discounting the bills, communicated to B. & C., and all the parties subsequently became bankrupts, when part of the return-proceeds came to the hands of B. & C.; it was held that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of B. & C. were bound to pay such proceeds to the assignees of D.⁴

So, where B. S. & Co. of Calcutta, having consigned to G. B. in England certain goods, on which they had a lien for the price, wrote him word that they intended to draw in favour of G. K. & Co. for the balance of such shipments, and that they inclosed bills of lading and policies of insurance for the goods in question, and they also drew a bill for the amount on G. B. in favour of G. K. & Co., which they directed him to "place to account of shipments per Gardner," and before the goods reached England, G. B. became bankrupt, and the goods came to the possession of his assignees; it was held that the above expressions in the bill and the letter

¹ *Hawes v. Croce*, Ryan & M. 414.

² Ante, page 505.

³ Ex parte *Perfect*, Mont. 25.

⁴ Ex parte *Copeland*, 3 D. & C. 199. Ex parte *Prescott*, id. 218.

amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to G. K. & Co. for the proceeds.¹

So, where the bankrupt shipped goods to M. & F. at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances, and notice of this agreement was given to M. & F., after which, two bills remitted to England by them on account of the proceeds of some of the shipments, came to the hands of the assignees; it was held that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to M. & F., to be applied in discharge of the petitioner's acceptances.²

And where A. & Co., as brokers for B., sold goods, then in their possession, to C., which were paid for by a bill drawn by C., and accepted by D., and C. ordered A. & Co. to keep the goods in their hands, and sell them if they could make a certain profit; but, before the bill became due, D. failed, and A. & Co. applied to C. for security for the bill, whereupon he gave them an order to sell the goods, and *apply the proceeds in payment of the bill*, and C. afterwards, and before the goods were sold, became bankrupt, upon which his assignees brought trover against A. & Co.; it was held that they could not maintain it, for that, after the order given by C. to sell the goods and apply the proceeds in payment of the bill, they remained in their hands, subject to that charge.³

But where A. & Co. and B. & Co. engaged in a joint adventure to India and China, upon the following terms, viz. that 10,000*l.* was to be invested in India bills, the proceeds of which were to be remitted to China, A. & Co. giving instructions as to one half, and B. & Co. as to the other half, and the outlay of money to either party to be saved by A. & Co. negotiating their drafts upon B. & Co., and renewing them till the funds came home, the 10,000*l.* being to be advanced by the parties in equal shares, but B. & Co.'s moiety to be provided for by a bill drawn on them by A. & Co. payable at six months, and A. & Co.'s moiety by another bill drawn by them on B. & Co., payable at four months,

¹ *Ex parte Gladstones*, 3 M. D. & D. 109.

² *Bailey v. Culverwell*, 8 B. & C. 448.

³ *Ex parte Flower*, 4 D. & C. 449.

which was to be discounted by A. & Co.; after which bills and goods were accordingly remitted from India to China, where the same were realized by the agents of A. & Co., and the proceeds invested by them in the purchase of other goods, one portion of which was consigned to A. & Co., and the other to B. & Co. in England; and B. & Co. becoming bankrupt before their portion of the return-proceeds arrived, A. & Co. were obliged to pay the bill drawn by them for B. & Co.'s moiety of the 10,000*l.*; it was held that this was not such a joint adventure as to give A. & Co. a lien on B. & Co.'s portion of the return-proceeds for the amount of the bill,¹ there being no specific appropriation of the goods for the liquidation of the bill, but merely a reliance by the parties on each other's personal credit.

As to the lien of an *attorney and solicitor*, see post, Chap. XXIII.

And as to a *landlord's* lien for rent, see ante, Chap. IX., Sect. 17.

SECTION X.

Of the Claims, and Process, of the Crown.

The Crown, not being bound by the provisions of any act of parliament in which it is not expressly named, and not being mentioned in any bankrupt act among the general creditors of the bankrupt, is not barred, therefore, of any of its paramount rights over the other creditors,² and may consequently issue process for the recovery of its own debt, notwithstanding a fiat in bankruptcy is sued out against its debtor. But this is only *before* the appointment of the assignees; for, *after* such appointment, the property is wholly changed and divested out of the bankrupt.³

An extent served upon the property of the bankrupt *before* the appointment of assignees will bind from the teste of the writ;⁴ and it seems that it has the same operation upon *debts* due to the bankrupt as upon *goods* in his possession, and that both are equally bound from the teste of

¹ *Ex parte Gemmell*, 3 M. D. & D. 198.

² *Ex parte Russell*, 19 Ves. 165.

³ *Rex v. Cotton*, 2 Ves. 295. 1 & 2 W. 4, c. 56, s. 25.

⁴ *Audley v. Halsey*, Sir W. Jones, 202. *Rex v. Pixley*, Bunb. 202. *Rex v. Bowdley*, 1 C. B. L. 372. *Lechmere v. Thoroughgood*, 3 Mod. 236. *Roake v. Dayrell*, 4 T. R. 408.

the writ;¹ though it has been decided, in cases where the king's debtor himself was before the court, that *debts* were only bound from the teste of the inquisition.² And the Crown will not be prejudiced by any fraction of a day; for, though the extent is tested the same day as the appointment, the Crown will be preferred.³

Under the former bankrupt law the practice was, when it was apprehended that any extent would issue against the bankrupt's property, the commission was sealed with all possible dispatch, in order that the party might be adjudged a bankrupt, and a *provisional assignment* executed forthwith to bar the process of the Crown.⁴ This practice has now become obsolete since the appointment of the official assignee, who, by 1 & 2 Will. 4, c. 56, s. 22, until assignees are chosen by the creditors, is authorized to act as the sole assignee of the bankrupt's estate. It is somewhat doubtful, however, whether the Crown could now be barred before the appointment of the creditor's assignees.

If an extent is issued against one partner, the Crown can only take the separate interest of the partner, and that liable to the partnership debts.⁵

When property of *various description* is seized under an extent issued for a debt due to the Crown, the Crown has a right to *elect* out of which species of property it will be satisfied its debt, before any other creditor of the bankrupt, having a claim or lien upon any portion of that property, can insist upon such claim.⁶

Although the bankrupt's effects taken on an extent have been sold (under a *venditioni exponas*) in default of claim, this does not conclude his assignees; and they will be allowed, on application, to enter their claim, and plead in such a case, on payment of the costs of the sale and the application, and putting the prosecutor of the extent in the same situation as if the claim and plea had been entered in due time;⁷ and the delay of a month is not considered as *laches* on the part of the assignees,⁸ though any considerable delay will strongly prejudice their claim.⁹

¹ *Queen v. Arnold*, 7 Vin. 104. S. C. West on Extents, 327; and see *ibid.* 164.

² *Attorney-General v. Elwall*, Bunb. 199. *Rex v. Green*, *ibid.* 265; and see *Rex v. Glenny*, 2 Pri. 396.

³ *Rex v. Crumpton*, Parker, 126; cit. 2 Ves. 295. Sed vide post, ch. xvi. s. 4.

⁴ *Wydown's case*, 14 Ves. 88.

⁵ *Rex v. Saunderson*, Wightw. 50.

⁶ *Ex parte Rowton*, 1 Rose, 15, 17 Ves. 426.

⁷ *Rex v. Adams*, 5 Pri. 39.

⁸ *Ibid.*

⁹ *Rex v. Jones*, 8 Pri. 108.

Extents in aid.] The prerogative of the Crown to recover its debt by the summary process of extent, is extended as a privilege to the king's debtor, in order that the Crown may be more speedily satisfied its own debt; and this species of extent is called an *extent in aid*. Great abuses, however, having been committed in the issuing of these extents, and grievous injustice often occasioned by them to the general creditors of a bankrupt, they have been limited in their operation by the salutary provisions of the 57 Geo. 3, c. 117. By this act¹ the king's debtor cannot levy under an extent in aid more than the amount of the debt which he himself owes, notwithstanding his own debtor, against whom the extent is issued, may owe him a larger debt. And with respect to the remainder of his debt, he is put upon the same footing as every other creditor. An extent in aid, also, cannot be sued out by any² *simple contract* debtor to the Crown; nor by any person indebted to the Crown by bond, for paying any particular duty which shall be payable in respect of his *trade or calling*; nor by any sub-distributor of stamps, who may have given bond to the Crown; nor by any person who shall give bond as a *surety* only for some other debtor to the Crown, until such surety shall have made proof of a demand having been made upon him on behalf of the Crown, and then only to the amount of such demand. But these restrictions are not to affect a person, who may become a debtor to the king as a *collector of revenue*, by simple contract, in case he shall be bound by bond, or specialty of record in the exchequer, for paying over to his majesty the particular duties which shall constitute the debt that may be then due from such person to the Crown. And no extent in aid³ can issue on a bond given by any *surety*, for the payment of duties due from any *insurance company*.

In order, also, to relieve the bankrupt's creditors from the operation of any fraudulent extent in aid, it is provided by the 6 Geo. 4, c. 16, s. 71, that if any real or personal estate, or debts of any bankrupt be extended, *after* he shall become bankrupt, by any person, under pretence of his being an *accountant of or debtor to the king*, the commissioners may examine upon oath, whether the debt was due upon any *contract originally made between such accountant and the bankrupt*; and, if made with any *other person*, or in trust for any other person or persons, then the title of the bankrupt's

¹ Sections 1, 2, 3.

² Section 4.

³ Section 5.

assignees will be valid against the extent and all persons claiming under it.

An immediate debtor to the Crown, to whom money had been paid by the district collector of excise, and who had entered into the usual bond to the Crown to pay over the money, or remit good bills for the amount within twenty-one days after the receipt of it, was held to be not entitled to sue out an *extent in aid*, unless there had been, in point of fact, a literal breach of the condition of the bond.¹ But the court of exchequer will not interfere, on the behalf of the assignees of a bankrupt, to set aside an extent in aid, if there is any doubt whether there is a debt due from the prosecutors of the extent to the Crown, or not.²

Money collected for the *land tax*, in the hands of the collector, is a debt due to the king; and where a *warrant* from the commissioners of the land tax was *executed before* the assignment to the assignees, it was held to bind the property, though it was not removed until after the assignment. But the warrant of the commissioners is not equal in its operation to that of an extent; for it only binds the goods from the *time of seizure*, and not from the *date* of the warrant.³ After the execution of a warrant, if the effects seized under it are insufficient to pay the whole debt due to the Crown, an extent may also issue for the same debt.⁴

A mere *recognizance* (though a debt upon record due to the Crown) has no operation upon the bankrupt's property, until some process of seizure is issued upon it.⁵

Nor will a recognizance to the Crown, entered into by a bankrupt and his sureties, on his being appointed guardian and receiver to the estate of an infant, entitle the bankrupt's sureties, if they are obliged to make good monies due from him to the infant's estate, to be preferred to the creditors under the fiat; as it is not a debt really due to the Crown, but a mere form, to secure a debt due to the subject.⁶

Excise duties.] Independently of the rights which the Crown possesses against its *general debtor* by process of extent, the different *excise* acts (imposing duties on various articles) give it, in most cases, an absolute lien upon the *subject-matter* of the duty, and the utensils employed in the manufacture of it. Thus, where an information was exhibited

¹ *Res v. Tarlton*, 9 Pri. 647.

² *Evans v. Solly*, 9 Pri. 525.

³ *Brassey v. Dawson*, 2 Str. 977.

⁴ *Rex v. Jones*, *supra*.

⁵ *Ex parte Usher*, 1 Ball & B. 197. 1 Rose, 366.

⁶ *Re Dutton*, 2 Molloy, 442.

against a candle-maker (though after a commission of bankruptcy had issued against him, and even *after assignment*) for non-payment of the single duties upon candles, and he was convicted in the penalty of double duties; the court of King's Bench held that all the candles, materials, and utensils in the hands of the assignees were liable to the payment of the double duties.¹ So, where malt duties were unpaid at the time of the execution of the assignment, the malt in the hands of the assignees was held to be subject to the payment of the duties, and liable to be seized under an extent issued after the date of the assignment.²

But, as the lien given under the excise acts is only upon the *particular* goods or articles to which the duty attaches, a warrant, therefore, to levy a duty, or a penalty, upon a bankrupt's goods *generally* (*after* the commissioners' assignment) is bad, and will not justify even a seizure of the very articles to which the duty, or the penalty, does really attach. Thus, where a soap-maker incurred a forfeiture for concealing soap contrary to the 1 Geo. 1, c. 36, s. 2, and, on his becoming bankrupt, a provisional assignment of his estate was executed, and afterwards the soap was condemned, and the bankrupt convicted; a warrant to levy on *his goods generally* was held illegal, as being a warrant against *all* the bankrupt's goods, when only *some* of them were liable.³ So, where under the 3 Geo. 4, c. 95, s. 10, the Crown had a lien on certain stage-coaches, horses, &c., in respect of duties accruing thereon; it was held that such lien only extended to the *particular* duties on each coach, &c., and not to the general stock of the party.⁴

Assessed taxes.] In the case of *assessed taxes* being in arrear from the bankrupt,⁵ his goods and chattels, before removal by the assignees, are liable to the collector for all arrears of duties due at the time of their taking possession of the goods, or which shall be *payable for the year*, in which they shall so take possession. If the duties are claimed for more than one year, the assignees may take the goods on paying the collector one year's duties; and if they refuse to do this, then the collector may distrain for the whole arrears of duties.

Where an *army agent* became bankrupt, the assignees were

¹ *Stracey v. Hulce*, 2 Doug. 411.

³ *Austin v. Whitehead*, 6 T. R.

² *Attorney General v. Senior*, and
Rez v. Fowler, 2 Doug. 416.

436.

⁴ *In re Day*, 1 M'Clell. & Y. 384.

⁵ 43 Geo. 3, c. 99, s. 37.

held bound to render an account to the Crown of unclaimed balances (remaining in the hands of the bankrupt) on money intrusted to and received by him, on account of officers belonging to the several regiments for which he was agent, and also a statement of their names and ranks; and *that* for any period of time during the agency, however remote; which accounts the Crown is entitled to demand from any agent under the 45 Geo. 3, c. 58. And the attorney-general may compel the assignees to furnish such an account, by filing an information against them and the bankrupt in the court of exchequer.¹

¹ *Attorney-General v. Ross*, 8 Pri. 190.

CHAPTER XII.

OF THE DIVIDEND.

- SECT. 1. *Of the First Dividend.*
2. *Of the Second and the Final Dividend.*
3. *Of the Payment of Dividends.*
4. *Of Unclaimed Dividends.*
5. *How a Dividend is to be recovered.*

SECTION I.

Of the First Dividend.

By section 107,¹ the commissioners are directed, not sooner than four, nor later than twelve calendar months from the issuing of the commission, to appoint a public meeting, (whereof twenty-one days' notice is to be given in the *Gazette*,) to make a dividend of the bankrupt's estate; at which meeting all creditors, who have not before proved their debts, are entitled to prove them; and the commissioners are then to order such part of the net produce of the bankrupt's estate (in the hands of the assignees) as they shall think fit, to be forthwith divided amongst such creditors as have proved debts under the commission, in proportion to their respective² debts. And by 5 & 6 Vict. c. 122, s. 27, the commissioners may now declare a dividend at or after the sitting appointed for the bankrupt's last examination. One part of the order for the dividend must be filed amongst the proceedings under the commission, and another part is to be delivered to the assignees; and it must contain an account of the time and place where it is made, of the amount of the debts proved, and of the money remaining in the hands of the assignees to be divided;—as well as how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the

¹ This section is taken chiefly from the 5 Geo. 2, c. 30, s. 33, the only difference being, that the commissioners are directed to make

the dividend, instead of the assignees.

² And see Lord Loughborough's General Order, 8th March, 1794.

commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained. The assignees are then forthwith to make the dividend, and to take receipts (in a book to be kept for that purpose) from each creditor for the dividend received. The order of the commissioners, and the receipt of the creditor, will be a discharge to every assignee, for so much as he shall pay pursuant to such order. But no dividend is to be declared, unless the accounts of the assignees have been first audited¹ by the commissioners in the manner directed by the 106th section; which may now (by 5 & 6 Vict. c. 122) be done at or after the sitting appointed for the last examination of the bankrupt. But no audit and dividend can be appointed for the same day, except for some special cause, to be stated to the court in writing at the time of such appointment, and allowed;² nor unless the assignees shall deliver in a statement upon oath of all money received by them, pursuant to the directions contained in the same section.³

The assignees, therefore, cannot be compelled, and indeed are now incompetent, to make a dividend of the bankrupt's estate, *before* the expiration of *four calendar months* from the commission.⁴ But after that time, if they have sufficient funds in their hands, it is their duty to apply to the commissioners to appoint a meeting⁵ to declare one;—though the precise time (until the expiration of twelve calendar months from the issuing of the commission) must rest with the assignees.⁶

If the assignees, after the expiration of four months, *refuse* to make a dividend, they are bound to account satisfactorily for such⁷ refusal; and if they do not, any creditor (who has proved a debt) may apply to the commissioners to appoint a meeting, for the assignees to show cause why they refuse to make a dividend;⁸ and the summons and the meeting may be had without any expense to the creditor;⁹ as it is the practice of the commissioners in London to take no fees for such meetings.¹⁰ The meeting to show cause is not advertised, but the assignees are merely privately summoned before

¹ This is taken from the 49 Geo. 3, c. 131, s. 5.

² General Order of 12th Nov. 1842, Rule 18, post, Append. and 3 M. D. & D. App. lviii.

³ And see ante, page 327.

⁴ *Cooper v. Pepys*, 1 Atk. 106.

⁵ The meeting to declare a dividend (as well, indeed, as all other public meetings under every town

commission,) is now held at the new court of commissioners of bankrupts in Basinghall-street.

⁶ *Treves v. Townsend*, 1 Bro. 385.

⁷ *Ex parte Grosvenor*, 14 Ves. 590.

⁸ And see General Order, 8th March, 1794.

⁹ 1 C. B. L. 521.

¹⁰ *Eden*, 353.

the commissioners. If the commissioners decline to appoint such meeting, or the assignees refuse to obey the commissioners' order to make a dividend, the lord chancellor will then, upon petition, order the assignees to attend the commissioners, and direct the latter to declare a dividend, if, upon examining the accounts and the assignees upon oath, they find there is a sufficient fund.¹

The lord chancellor may, in his discretion, postpone the dividend beyond the time limited by the statute; but he will not do so, unless fully satisfied that the postponement will be for the general benefit of all the creditors, and that the parties applying for the postponement have a right so to apply. Therefore, where a petition was presented by creditors of surviving partners, that the dividend might be postponed, until those (who were also creditors of the deceased partner, and who had filed a bill against his representatives, for an account of his assets and payment of their debts) should have gone in under the decree;—the lord chancellor dismissed the petition, on the ground, that there was no equity, in the creditors of the surviving partners, to make such an application.²

The only grounds for staying the payment of a dividend in favour of a creditor who has not proved, is where the creditor has been prevented from proving by fraud, accident, or mistake. Therefore, when the omission to prove proceeds from the creditor's own *laches*, the court will not order a dividend to be stayed, until his petition to prove can be heard.³ But where the delay was occasioned by the creditor having been misled by the assignee,⁴ by an intended composition of the bankrupt with his creditors, the court in that case stayed the payment of the dividend.⁵ And if at a dividend meeting, a proof is rejected, from the creditor's inability through accident to produce the security, the dividend may be opened, on immediate notice to the assignees to suspend payment, by presenting a petition to the court of review.⁶

If the assignees neglect to make a dividend in proper time, and wilfully retain or employ any monies of the bankrupt's estate to the amount of 100*l.* for their own benefit, they are chargeable with interest at the rate of 20*l.* per cent. on all such money, for the time during which it has been so retained or employed.⁷ And they have been charged with common

¹ Ex parte *Whitchurch*, 1 Atk. 91.

² Ex parte *Kendall*, 1 Rose, 71; 17 Ves. 514, and see ex parte *Thompson*, 2 M. D. & D. 761.

³ Ex parte *Brees*, 3 D. & C. 283. S. P. Ex parte *Todd*, 2 Dea. 273.

⁴ Ex parte *Colton*, 3 D. & C. 194.

⁵ Ex parte *Hunt*, 2 Dea. 213.

⁶ Ex parte *Barclay*, Mont. 126.

⁷ Section 104; and see ante, 338.

interest, though the money has lain at a banker's, and they have not been paid interest for it.¹

Where a claim has been properly entered on the proceedings, the person making the claim is entitled to have a dividend reserved upon it; but such dividend must be retained by the assignees, until the claim is duly substantiated as a debt;² and at a second or final dividend, the claim, if not substantiated, should be struck out.³

If a creditor has been permitted to prove upon an instrument of larger amount than his real debt, he will not be entitled to receive dividends to a greater amount than upon the real debt due to him.⁴ And if the consideration, of bills of exchange proved under the commission, is other bills given by the creditor to the bankrupt, the payment of the dividend must be stayed upon his proof, until the extent of his real claim against the bankrupt is ascertained;⁵ or the proof must be reduced *pro tanto*, if he has already received part of his debt upon any other security.

But notwithstanding the creditor may receive a large portion of the debt from a surety, this will not prevent him from receiving dividends on the whole amount of his proof, provided he does not receive more than 20s. in the pound upon his whole debt.⁶

If a creditor has obtained an unfair possession of the bankrupt's property, his share of the dividend may be retained until he gives up the property.⁷ And as a creditor, by proving, has submitted himself to the jurisdiction in bankruptcy, the lord chancellor, when he directs a debt to be expunged, has power to order any dividend that has been received under it to be refunded.⁸

The solicitor's charge for computing the dividends, and preparing and copying a list of the debts, will be allowed in the assignees' accounts.

It is somewhat doubtful whether an assignee has a right to retain a dividend, as a set-off against a private debt due to him from the creditor. There have been different decisions upon this point. Lord Talbot permitted an assignee to exercise this right of set-off;⁹ but Lord Hardwicke refused to do

¹ *Hilliard's case*, 1 Ves. 89. *Treves v. Townsend*, 1 Bro. 384.

² And see ante, page 307.

³ 1 Christ. B. L. 562.

⁴ *Ex parte King*, 1 C. B. L. 156. *Ex parte Crossley*, *ibid.* 157. *Ex parte Bloxham*, 6 Ves. 449, 600.

⁵ *Ex parte Clanricarde*, 1 C. B. L. 160.

⁶ *Ex parte Coplestone*, 3 Dea. 487.

⁷ *Ex parte Smith*, 3 Bro. 46.

⁸ *Ex parte Burn*. *Ex parte Dewdney*, 2 Rose, 59 note.

⁹ *Ex parte Nockold*, 1 C. B. L. 522.

so, saying, that he would not allow the assignee (who was an officer of the commission) to stop a person's share in the dividends, on account of his own private debt owing to him from that person; for that he had his remedy at law, and ought not to blend his own private affairs with the commission, to which he was only a trustee.¹ And in a case before Lord Eldon, where one of two assignees claimed to set off a private debt of his own against the dividend;—upon a petition that the assignees might be ordered to pay the dividend, Lord Eldon would not allow the set-off, on the ground that the dividend was due *from two* assignees, and the debt only due *to one*;—but he made no observations on the previous decisions.²

Where a banker to the estate, being also a creditor of the bankrupt, becomes bankrupt himself, his estate is not entitled to any dividend on his debt proved under the commission, until the whole monies received by him, as banker to the estate, have been³ accounted for.

Neither an assignee, nor the solicitor under the commission, is permitted to purchase a dividend for his own benefit.⁴

The lord chancellor cannot, in a proceeding by *bill*, reverse the order of the commissioners for a dividend, the only course being by *petition* in bankruptcy.⁵

SECTION II.

Of the Second and the Final Dividend.

By section 109, if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners are directed, within eighteen calendar months after the issuing of the commission, to appoint a public meeting (of which twenty-one days' previous notice is also to be given in the *Gazette*), to make a second dividend of the bankrupt's estate, when likewise all creditors may prove their debts, who have not previously proved them. The commissioners are then, after auditing the accounts of the assignees, (as directed by the 106th section,⁶) to order the balance in their hands to be forthwith divided amongst such

¹ Ex parte *White*, 1 Atk. 90.

⁴ Ex parte *James*, 8 Ves. 350.

² Ex parte *Bruce*, Whitm. B. L. 315.

⁵ *Clarke v. Capron*, 2 Ves. jun. 668.

³ Ex parte *Bebb*, 19 Ves. 223.

⁶ See ante, p. 327.

of the creditors as shall have proved their debts; and such second dividend is directed to be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, or not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees; in which last cases they are directed, as soon as may be, to convert such estate and effects into money, and within two calendar months after the same shall be so converted, to divide the same in manner before mentioned.

Under every fiat issued within six months before the commencement of the 5 & 6 Vict. c. 122, or thereafter issued, a final dividend must be advertised within two years after the date of the fiat; and under every fiat issued twelve months or more prior to the commencement of the act, a final dividend must be advertised within eighteen months after the commencement of the act; unless, in either case, there be some cause to the contrary to the satisfaction of the commissioner, to be stated in writing, and filed with the proceedings.¹

When creditors prove their debts in the first instance at the meeting for the second dividend, it must be upon the terms of not disturbing the former dividend; but it is incumbent on them to explain why they have not sooner proved; and if they can reasonably account for the delay, they will then be admitted to a participation in the former dividend, before the commissioners proceed to make a second.² This indulgence was not formerly granted, it being considered that creditors (who had not proved before a dividend) could only be paid *future* dividends *pari passu* with the rest of the creditors. The strict and regular mode of being admitted to receive former dividends is, by petition;³ but it is the practice for the commissioners, without an order, first to direct the creditor to be paid the former dividend, and then to direct a general distribution of the residue of the bankrupt's effects.⁴ When the assignees pay former dividends to any creditors subsequently proving, without an order, they must also pay them to every other creditor in the same situation.⁵

Where a creditor, through accident, omitted to prove at the final dividend meeting, he was permitted to prove, with-

¹ General Order of 12th November, 1842, Rule 19, post, Appendix, and 3 M. D. & D. App. lviii.

² Ex parte Long, 2 Bro. 50. Ex

parte Stiles, 1 Atk. 208. In re Wheeler, 1 Sch. & Lef. 242.

³ Ex parte Long, 2 Bro. 50.

⁴ 1 C. B. L. 521.

⁵ Ex parte Long, 2 Bro. 50.

out disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved.¹

The assignees are accountable for any money they distribute among the creditors, without an order of dividend; and may be called upon by the bankrupt to declare a final dividend to the amount of the sum distributed, with a view of claiming his allowance.²

SECTION III.

Of the Payment of Dividends.

By a general order of Lord Lyndhurst,³ the official assignee must, within one week after the declaration of a dividend, give notice by advertisement in the *London Gazette*, and to each creditor by a printed circular letter, in the form specified in the schedule to the order, to be sent through the post-office at the cost of the bankrupt's estate, to be settled by the commissioner, of the time and place of the delivery of the dividend warrants, and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt, until such security shall be produced, without the special directions of a commissioner in that behalf.

By rule 24 of the above general order,⁴ when a dividend is declared, the solicitor to the estate is required to make out three lists of the creditors in alphabetical order, and state in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof. To each name he must prefix a number in regular series, together with the date of the order of dividend, according to the form contained in the schedule to the general order. He must then sign such lists, and file one, which specifies such securities with the proceedings, and deliver the other to the official assignee, together with the list not specifying the

¹ *Ex parte Day*, Mont. 212.

² *Ex parte Lomas*, 3 D. & C. 681.

³ 12th November, 1842, Rule 22, post, Append., and 3 M. D. & D. App. p. lxxii.

⁴ This rule is nearly a copy of the General Order of the Lords Commissioners of the 31st October, 1835; see post, Append., and 4 D. & C. 686.

securities. The official assignee is then to examine and sign the lists, if correct, and to prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule, and to number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and to keep the list specifying the securities in his custody. He must take the books containing such warrants, together with the list not specifying the securities, to the accountant in bankruptcy, who is to ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and compare the warrants with the list, and if correct, certify the same by affixing the seal of his office to the margin of the warrant, and keep in his custody the list of creditors, and return the warrants to the official assignee.

When a creditor applies for his dividend warrant, the official assignee is directed to require the production of any security exhibited by the creditor at the time of his proof; and if satisfied that the amount of the dividend still remains due, he is to fill up the date in the warrant and receipt; and upon the creditor signing the receipt, the official assignee is to mark the securities (if any) with the warrant of the dividend, and to sign and deliver the warrant for the same. And no dividend warrant is to be delivered to any creditor holding any security for his debt, until such security shall be produced.

But upon the statement of a creditor, that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he must be examined on oath before a commissioner as to the cause of such inability, and his examination must be filed with the proceedings, and the commissioner is to adjudge, whether in his opinion the creditor is, or is not, able to produce the security. If the commissioner thinks that the security cannot for a sufficient cause be produced, the creditor must then give a sufficient indemnity to the official assignee, to be approved by the commissioner upon which the official assignee is to deliver the dividend warrant to the creditor.¹

The payment of the dividend warrant² may be obtained

¹ General Order of 14th May, and 3 M. D. & D. lxxvi. And see 1836, and 12th November, 1842, ex parte *Robins*, 1 Dea. 587.
Rule 25, post, App. 1 Deac. 692; ² Id. Rule 26.

by the creditor, or any person duly authorized by him under his hand, or by the executor or administrator of a creditor, upon production of the dividend warrant at the office of the accountant in bankruptcy, or in a country bankruptcy, at any branch of the Bank of England, or any other bank named by the Bank of England. If any other person claim to receive the dividend, he must obtain an order for payment indorsed upon the warrant by a commissioner. If any dividend warrant be above twelve months' date, a like order by a commissioner is required. In no case can any dividend warrant be paid to an official assignee, unless he be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt's payee.

When a dividend is declared, the commissioner may, by order under his hand testified by a deputy registrar, in the form specified in the schedule,¹ direct the sum ordered to be divided, or such part thereof as may be required, to be carried from the general account to the "dividend account" in the books of the accountant in bankruptcy, and to the particular estate. But when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for, the commissioner may, by order under his hand, in the form specified in the schedule to the general order, direct such sum to be carried back to the original account of the estate to which it belonged.

All dividend warrants which shall have been delivered to any official assignee by the accountant in bankruptcy for more than twelve calendar months,—the same having been previously stamped by the accountant, but which shall not have been delivered to any creditor,²—must forthwith, after the expiration of the twelve months, be sent by the official assignee, together with two lists thereof, to the accountant, who is thereupon to compare the warrants with such lists and cancel such warrants. One of the lists is to be certified by the accountant and returned to the official assignee, who is to file it with the proceedings, and the other to be retained by the accountant, and the payment of the dividend to be made in the manner directed by the lord chancellor.

By the 5 & 6 Vict. c. 122, s. 55, the official assignee is required, fourteen days before a *final* dividend is advertised, to send to each creditor's assignee a debtor and creditor account between the official assignee and the estate, showing also the monies remaining uncollected under such estate, and

¹ Id. Rule 27, post, App.; and ² Id. Rule 28.
3 M. D. & D. App. lxxv.

the cause of their being uncollected; a copy of which account is to be delivered to any creditor who shall have proved or claimed a debt under the fiat, upon his applying for the same, and to any other person, such person (not being a creditor) paying 2s. 6d.

An assignee cannot set off his own debt against the amount of a dividend payable to a creditor.¹

SECTION IV.

Of Unclaimed Dividends.

By 5 & 6 Will. 4, c. 20, s. 6, all dividends unclaimed, and also any undivided surplus of a bankrupt's estate, are directed to be paid into the Bank of England to the credit of the accountant in bankruptcy, to be carried to an account intituled "the unclaimed dividend account," subject to the order of the lord chancellor, or the court of review, or of any commissioner, for the payment thereof of any dividend due to any creditor; and subject also to the order of the lord chancellor, for the investments thereof in the purchase of government or parliamentary securities, which are to be carried to "the bankruptcy fund account," and to be subject to the rules and regulations of the lord chancellor. But the order of any commissioners for payment of any such dividend, is to be subject to appeal to the court of review.

By section 7, if any assignee shall have in his hands, or subject to his order or disposition, or shall know that there is in the hands or in the order and disposition of himself and any co-assignee, any unclaimed dividends, or any such undivided surplus, amounting to 20*l.*, he is required, within three calendar months after the expiration of one year from the time of the declaration of the dividend, either to pay the same to the creditor or other person entitled to the same, or to cause a certificate thereof to be filed in the secretary of bankrupt's office, containing a full and true account of the name of the creditor to whom such dividend is due, and of the amount of such dividend; and he is also required within the same period after the final declaration of dividend, to file in the same office a certificate stating the full and true amount of any such surplus, which certificate must in both cases be signed by the assignees. Every assignee making default in filing such certificate, is liable to be charged with interest

¹ *Ex parte Bailey*, 1 M. D. & D. 263.

upon the amount of such unclaimed dividend or undivided surplus, from the time at which such certificate is required to be filed, at the rate of 5*l.* per cent. per annum, during the retention of the same, and also with such further sum as the lord chancellor, or the court of review, shall direct, not exceeding in the whole at the rate of 20*l.* per cent. per annum. And every assignee is required, within one year after the filing of such certificate, to pay into the Bank of England, to the name of the accountant in bankruptcy, the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor, or other person entitled thereto, and also the full amount of such undivided surplus; and in case of the assignees making default, the lord chancellor, or court of review, on petition or otherwise, may order the same to be forthwith paid into the Bank, together with any further sum to be charged on the assignee, not exceeding after the rate of 20*l.* per cent. per annum on the sum so withheld, to be computed from the filing of such certificate, and may also make such further order as the justice of the case may require.

And by 6 & 7 Will. 4, c. 27, s. 7, after reciting that a doubt had arisen whether the provisions in the above act extended to a case where official assignees had not unclaimed dividends or undivided surplus *in their hands*, the same being, according to the provisions of the above act, kept at the Bank of England; it is provided that every official assignee shall cause a certificate to be filed of all unclaimed dividends and undivided surplus belonging to any bankrupt's estate under his care and management, in such manner, and subject to such provisions and penalties, as by the above act is prescribed with respect to the unclaimed dividends, and undivided surplus therein mentioned. And by section 8, they are to be paid to the same account, and to be subject to the same orders, as are specified in the first-mentioned act.

SECTION V.

How a Dividend is to be recovered.

The creditor might formerly, after a dividend was declared by the commissioners, either bring an action of assumpsit against the assignees for the recovery of it,¹ or petition the lord chancellor for an order on them to pay it.² But, as

¹ *Brown v. Bullen*, Doug. 392.
Gillies v. Smith, 1 C. B. L. 521.

² *Ex parte White*, 1 Atk. 90.
Bishop v. Church, 3 Atk. 691.

assignees were frequently put to considerable expense and inconvenience in applying to the lord chancellor to stop proceedings at law, when there was an equitable defence to the claim of the creditor for the dividend, it was considered by Lord Eldon¹ (before, indeed, the passing of the recent statute), that there would be great convenience in the creditor being confined to the exclusive jurisdiction of the lord chancellor; because then the legal demand, and the equitable opposition, would be considered and disposed of together. It is, therefore, now provided by the 111th section of the new act, that no *action* for a dividend shall be brought against the assignees; but if they refuse to pay any dividend, the lord chancellor may, upon petition, order payment thereof with interest for the time that it has been withheld, together with the costs of the application.

This clause, however, does not enable the assignees to resist the payment of a dividend upon a debt duly proved under the commission, any more than they could formerly in an action at law; therefore, if there is any *objection to the debt*, upon which a petition is presented to be paid a dividend, the assignees should previously present another petition to the chancellor to expunge or reduce the debt;² or, at any rate, apply to the commissioners to do so (under the power given to them by the new act)³ previous to the hearing of the petition of the creditor. For, upon any petition to pay dividends upon a debt proved, the order of dividend will be received as in itself establishing the petitioner's case; nor is it indeed a complete answer to the application, that a petition has been even presented by the assignees for the purpose of expunging the proof, and is in the lord chancellor's paper;⁴ though, if the assignees have really any equity to resist the payment of the dividend, the lord chancellor will in such a case either delay the order for the payment of the dividend,⁵ or, if he makes the order, he will reserve the question of costs until the hearing of the petition by the assignees.⁶

Where at a dividend meeting a claim was entered on behalf of a creditor, and a sum ordered to be appropriated in the hands of the assignee, to answer eventually the amount of the several sums proved and claimed; but before the claim was perfected into a proof, the assignee misapplied the money

¹ 1 Rose, 458.

² Ex parte *Whiteside*, 1 Rose, 319.
Ex parte *Lorley*, Buck, 456. Ex
parte *Atkinson*, 3 V. & B. 13.

³ Vide section 60, ante, 146.

⁴ Ex parte *Whitwell*, 2 Rose, 162.
Ex parte *Atkinson*, 3 Ves. & B. 14.

⁵ Ex parte *Hodges*, Buck, 524.

⁶ Ex parte *Whitwell*. Ex parte
Atkinson, supra.

and became bankrupt; it was held, that the creditor was not entitled to recover from the estate of the first bankrupt, in proportion of the sum appropriated in the hands of the assignee.¹

And where, under a commission against A., a dividend was declared and respectively advertised to be paid to the creditors who had proved; and subsequently to the appointed days for payment, B. & C., the bankers to the commissioners, in whose hands a sum more than sufficient for the payment of such dividend had been left by the assignees, became bankrupt; it was held that the order of dividend was to be considered as a separation from the bulk of the estate, of the sum to be divided, and that the unpaid dividends were lying in the hands of the bankers, at the risk of the creditors who had neglected to apply for payment.²

Where at a meeting to audit the assignees' accounts, and declare a dividend, the commissioner finds a certain sum to be in the hands of the assignees, and declares a dividend accordingly, it seems that each of the assignees is liable for the payment of the dividend, although the principal fund is then in the hands of only one of the assignees.³

The assignees are not justified in delaying the payment of dividends, on the ground that notice has been given them by a third person of a claim upon the dividends, if no petition has been presented by such claimant within a reasonable period after such notice.⁴ And the official assignee, being only a ministerial officer, cannot resist the payment of a dividend.⁵

A creditor is not entitled to interest upon his dividend under the above section of the act, unless he has actually applied to the assignees for the payment of it, and they have refused, or omitted, to pay it.⁶ But on a petition for payment of a dividend, which is unsuccessfully opposed by the assignees, interest at 5 per cent. and costs are of course against the assignees, who, if they acted *bonâ fide*, may reimburse themselves out of the estate.⁷

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many

¹ Ex parte Grant, Mont. & M. 77.

⁵ Ex parte Alexander, Mont. 503.

² Ex parte Powall, Mont. & M. 283.

¹ Dea. & C. 513.

³ Ex parte Ridley, 3 M. D. & D. 413.

⁶ Wackerbath v. Powell, Buck. 508. Ex parte Story, 4 D. & C. 504.

⁴ Ex parte Alsopp, 1 Mad. 603.

⁷ Ex parte Harrison, Mont. 250. Ex parte Holford, 4 D. & C. 798.

years; for the statute of limitations does not attach to a debt proved under a fiat in bankruptcy.¹ Unless it can be proved that a creditor has received a dividend, the *onus* of the proof of payment lies on the assignee, and this, notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the dividend.²

Where a party purchases of a creditor all his right to the dividends on his proof, it seems that he cannot proceed against the assignees by petition for an order to pay him the dividends, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity.³

¹ Ex parte *Healey*, 1 D. & C. 361.

² *Ibid.*

³ Ex parte *Richards*, 4 D. & C. 190.

CHAPTER XIII.

OF THE BANKRUPT.

- SECT. 1. *When liable to Arrest after the issuing of the Fiat.*
2. *Of the Duties and Liabilities of the Bankrupt, and herein of his Surrender.*
3. *Of the Examination of the Bankrupt.*
4. *Of the Bankrupt's Answers.*
5. *Of Committing the Bankrupt, and of the Remedies for his Discharge.*
6. *Of the Bankrupt's Rights and Privileges:*
1. *Of his Privilege from Arrest.*
 2. *Of his Maintenance during his Examination.*
 3. *Of his Allowance under the Commission.*
 4. *Of his Right to the Surplus.*
 5. *As to his Right to acquire Property before obtaining his Certificate.*
7. *Of Actions at Law by and against an uncertificated Bankrupt.*
8. *Of Suits in Equity and Petitions in Bankruptcy.*
- (*For Petitions by the Bankrupt to annul the Fiat, see post, Chap. XX.*)

SECTION I.

When liable to Arrest after the issuing of the Fiat.

By the 5 & 6 Vict. c. 122, s. 5, whenever a fiat is issued against any person, and it shall be proved to the satisfaction of the court authorized to act in the prosecution of such fiat, that there is probable cause for believing that such person is about to quit England, or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended, such court may issue a warrant

directed to any person to arrest the party named in the fiat, and also to seize his books, papers, monies, securities, goods, and chattels, wheresoever he or they may be found, and him and them safely keep until the expiration of the time allowed for opening the fiat, or until he shall be adjudged bankrupt under such fiat. But by section 6 any person so arrested, or whose books and effects have been so seized, may apply to such court for an order or rule on the petitioning creditor to show cause why the party should not be discharged, or why his books and effects should not be delivered up to him; and the court may make absolute or discharge such order or rule, and direct the costs of the application to be paid by either party. Any such order, however, may be discharged or varied by the court of review, on application by either party.

SECTION II.

Of the Duties of the Bankrupt, and herein of his Surrender.

After a party is declared a bankrupt, the first duty required of him is, to surrender himself to the commissioners. For, by 5 & 6 Vict. c. 122, s. 32, if he shall not, upon the day limited for his surrender, before three o'clock,¹ or at the hour before the day allowed him for finishing his examination, (after notice thereof in writing left at his usual or last known place of abode or business, or personal notice, in case he be then in prison, and after notice also given in the *London Gazette* of the issuing of the fiat, and of the sitting of the court authorized to act in the prosecution of the fiat,) surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time upon oath, he is liable to be convicted of felony, and may be transported for life,² or for a term not less than seven years; or he may be imprisoned and kept to hard labour, for any term not exceeding seven years.

An indictment against the bankrupt for not surrendering must set out truly the notice requiring him to surrender; any variance will be fatal.³

If the bankrupt is in prison under any process or sentence,

¹ And see 6 Geo. 4, c. 16, s. 112.

² The punishment of death, which was inflicted by the former statutes (4 & 5 Ann. 5 Geo. 1, 5 Geo. 2, c. 30, s. 1,) for not surrendering to a

commission, was abolished by the 1 Geo. 4, c. 115, and that of transportation substituted.

³ *Rez v. Burraston*, 1 Gow. 210.

and is desirous to surrender, the new statute provides,¹ that he may be brought before the commissioners (by their warrant directed to the gaoler) at the expense of the estate.² And, where a bankrupt in prison for debt is entitled to be carried before the commissioners to enable them to take his surrender, an order will be made for his doing so, notwithstanding he may upon a summary application obtain his discharge.³

By the 5 & 6 Vict. c. 122, s. 33, the court authorized to act in the prosecution of the fiat may now enlarge the time for the bankrupt's surrender for such period, and as often as such court shall think fit,⁴ so as the order for such enlargement be made six days at least before the day on which the bankrupt ought to have surrendered.⁵ The assignees, however, ought not to apply for such an order, if the bankrupt is ready and willing to surrender.⁶

The bankrupt may surrender, if he chooses, at a private sitting of the court, at any time before⁷ the day limited for such surrender; and it is his interest as well as his duty to surrender as early as possible; for, by doing so, he will be entitled to protection from arrest until he has passed his last examination.⁸ But, though the bankrupt choose not to surrender until the very last minute of his time, the commissioner has, nevertheless, authority to summon and examine him in the intermediate period, touching his estate and effects.⁹

If the bankrupt does not surrender himself within the limited time, namely, before three o'clock on the appointed day, and has obtained no order for his surrender being enlarged, he is warned to surrender by the messenger in the usual form of proclamation. But the omission to surrender must be *wilful*, in order to render it a felony;¹⁰ for an involuntary neglect in this respect will not subject him to the penalty inflicted by the statute. Therefore, where the bankrupt

¹ Section 119.

² And see *Spence v. Jones*, 5 B. & A. 705. Before the 49 Geo. 3, c. 121, if the bankrupt was in execution, the commissioners had no authority to order him to be brought before them, but were obliged to take his surrender in prison.

³ *Ex parte Emery*, Buck, 527.

⁴ Under the 5 Geo. 2, c. 30, s. 3, the lord chancellor could only enlarge the time for fifty days, and there could only be one such enlargement. And see 6 Geo. 4, c. 16, s. 113.

⁵ And see *ex parte Du Preau*, 1 Rose, 311. *Ex parte Rose*, 1 D. & C. 37.

⁶ *Ex parte Dayrie*, 1 G. & J. 281.

⁷ *Ex parte Thomas*, 3 D. & C. 234.

⁸ *Ex parte Wood*, 1 Rose, 46. 18 Ves. 1. *Rex v. Perrott*, 2 Burr. 1124.

⁹ Section 36; and see *ante*, page 148.

¹⁰ *Ex parte Rogers*, Amb. 307. *Ex parte Sherman*, *cit. ibid.*

makes an attempt to surrender, and is not able to do so, by the commissioners neglecting to attend¹—or if he is prevented from surrendering by illness,² or if he is in prison for debt³—the omission to do so, not being intentional, does not of course become a felony. And the same, where the bankrupt went abroad to recover a debt due to his estate, and took his passage for his return in the only ship bound for England, which did not arrive in time.⁴ When the bankrupt is prevented from surrendering by any accident of this kind, the lord chancellor will (upon his application, or that of the assignees, accompanied by an affidavit of the bankrupt,) order the commissioners to appoint a fresh meeting to take his surrender.⁵ And where a bankrupt had been erroneously advised by his solicitor, that the commission could not be sustained, and that his surrender was therefore unnecessary—and had, in reliance on that opinion, omitted to surrender,—a similar order was obtained;⁶ and the same, where his omission to surrender arose from an apprehension of a prosecution.⁷ Where the bankrupt is not guilty of any misconduct in omitting to surrender, the costs will be ordered to be paid out of the estate.⁸ In another case of this description, where a subsequent joint commission was issued, Lord Eldon superseded the first commission;⁹ and Lord Macclesfield, too, in more instances than one—where there did not appear to be any intention in the bankrupt of defrauding his creditors by not surrendering within the time, and where his absence proceeded from an ignorance of the consequences, or from accident—superseded the commission, in order to prevent a prosecution.¹⁰ But this will not be done, where no circumstances of *extenuation* appear;¹¹ and in all cases of this nature, the bankrupt pays the costs of the application.¹² If, however, the omission to surrender has not proceeded from ignorance of the consequences, but has been purely wilful on the part of the bankrupt, the lord chancellor will not then interfere by making any order;¹³ and Lord Thurlow even refused to make one, where the bankrupt stayed abroad at the desire of the assignees to get in his effects.¹⁴ Where the lord chancellor,

¹ Ex parte *Grey*, 1 Ves. jun. 195.

² Ex parte *Bould*, 2 Bro. 49. Ex parte *Ricketts*, 6 Ves. 445.

³ *R. v. Mitchell*, 4 C. & P. 251.

⁴ Ex parte *Higginson*, 12 Ves. 496.

⁵ See the four last cases. Ex parte *Jeffreys*, 2 D. & C. 686.

⁶ Ex parte *Shiles*, 2 Rose, 381.

⁷ Ex parte *Berryman*, 1 G. & J. 223.

⁸ Ex parte *Smith*, 4 D. & C. 810.

⁹ Ex parte *Lavender*, 1 Rose, 55. 18 Ves. 18.

¹⁰ Ex parte *Wood*, 1 Atk. 222.

¹¹ Ex parte *Roberts*, 2 Rose, 378.

¹² Ex parte *Carter*, 4 Madd. 394.

¹³ Ex parte *Smith*, 1 C. B. L. 434, and the preceding cases.

¹⁴ Ex parte *Dawson*, 2 Cox, 48.

by thus superseding the commission, exerts his authority to impede the ordinary course of law,—the same facts, which are sufficient to induce him to do so, will also, as it should seem, be a good defence to an indictment against the bankrupt for the felony.¹

In all these cases, where the chancellor makes an order for a fresh meeting to take the bankrupt's surrender, though the order will not absolutely protect the bankrupt from a prosecution, yet it will be considered as a declaration of the lord chancellor's opinion, that the bankrupt had no intention of keeping out of the way *fraudulently*; for otherwise it would not (of course) have been granted.² Where the bankrupt was prosecuted by a person, who was not a creditor, for not surrendering, and the circumstances of the case were in his favour, Lord Hardwicke refused to aid the prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission, and said he would leave the prosecution to go on in such manner as the law prescribed, to prove him a bankrupt and a felon, within the intent and meaning of the statute on which the prosecution was grounded.³

A petition for an order to enlarge the time for a bankrupt's surrender, must always be supported by an affidavit of the bankrupt himself. In only one instance, it is said, has this rule been dispensed with; and that was, where the bankrupt was coming to surrender to the commission, but was taken and detained as a prisoner by the French, and consequently could not make an affidavit.⁴ The consent of the assignees is not necessary previous to the bankrupt applying for the order; which, in fact, has been made upon one occasion, where the bankrupt's express object in surrendering was, that he might be enabled to petition to supersede the commission.⁵

Before the bankrupt has surrendered to his commission, it is a strict rule,⁶ that he cannot be heard upon petition; and

¹ 1 C. B. L. 436.

² Ex parte *Johnson*, 14 Ves. 40. Ex parte *Jackson*, 5 Ves. 119. Ex parte *White*, 2 Bro. 47. Ex parte *Richetts*, 6 Ves. 445. Ex parte *Shiles*, 2 Rose, 381.

³ Ex parte *Wood*, 1 Atk. 222.

⁴ *Fuller's case*, 10 Ves. 183.

⁵ Ex parte *Shiles*, 1 Mad. 248. 2 Rose, 381.

⁶ Ex parte *Drake*, 2 D. & C. 91. Ex parte *Knowlson*, 1 M. & B. 416.

This rule, however convenient it may be in point of practice, it is impossible to deny, must in some cases appear inconsistent and unreasonable;—for it compels a party to submit, in a certain degree, to the very authority which he contends to be invalid—and the validity of which (without any such previous surrender) it is competent for him to contest, either in a civil action, or a criminal prosecution.

his representatives, in case of his death before surrender, are not in a better situation—unless, indeed, their petition makes out a case, that would induce the court to permit a surrender if the bankrupt were living.¹ Therefore, where a bankrupt died abroad without having surrendered—and his personal representative petitioned, that the assignees might account for the surplus of his estate, as all other creditors had been paid 20s. in the pound;—the vice-chancellor dismissed the petition, saying, that if the petitioner had any equity, he must apply to the court by *bill*.²

Besides the first and more important duties of the bankrupt in surrendering himself to the commissioners, and making a full disclosure and discovery of his estate and effects—there are other specific duties imposed upon him by law, during the working of the commission, to enable his assignees to collect his effects, and divide them amongst his creditors.

Thus, by 6 Geo. 4, c. 16, s. 116, the bankrupt (if thereunto required) must deliver up to the assignees upon oath all his books of account,³ papers, and writings relating to his estate, and discover such as are in the custody or power of any other person; and he must at all times, if not in prison or custody, attend his assignees upon every reasonable notice in writing given to him, and assist them in making out the accounts of his estate; and, even after he has obtained his certificate, he is required, upon demand in writing, to attend his assignees to settle any accounts relating to his estate, as well as any court of record, to give evidence touching the same, and also to do any act necessary for getting in his estate; for which attendance he is entitled to five shillings⁴ per day from the assignees out of his estate. And if he shall not attend, or on attendance refuse to do any of such matters, (without sufficient excuse shown to the commissioners for such refusal,) the commissioners may, on the complaint of the assignees upon oath, cause the bankrupt to be apprehended on their warrant, and committed to prison until he shall conform to the satisfaction of the commissioners, or of the lord chancellor.

The bankrupt is also bound by the 78th section of the

Sir W. Evans thinks, that the surrender should be dispensed with, whenever the opposition of the bankrupt to the commission appears to arise from a fair and real objection to its validity, and not from any vexatious or improper motive; (see letter to Romilly, page 201;) an arrangement which, it is

submitted, would be not a very inequitable relaxation of the above inexorable rule.

¹ Ex parte *Crowther*, Buck, 480.

² Ex parte *Gardiner*, Buck, 458.

³ And see post, 516.

⁴ This allowance was before only 2s. 6d.

6 Geo. 4, c. 16, to join, if necessary, in any conveyance of his estate;¹ but he will not be compelled to do so, until he has had an opportunity of trying the validity of the fiat.²

And where the lease of a house belonging to the bankrupt had been sold by auction, under the usual order, on the petition of an equitable mortgagee, and the bankrupt was ordered to deliver up possession of the premises to the purchaser, but refused to do so, he was ordered to be committed.³

And at all times, till the bankrupt's affairs are finished, it is his duty, when required, to attend the commissioners, (whether before or after he has obtained his certificate,) to answer any questions which may be demanded of him relating to his estate or effects.⁴

By 5 & 6 Vict. c. 122, s. 35, if the bankrupt shall, within three months next preceding his bankruptcy, under the false colour and pretence of carrying on business, and dealing in the ordinary course of trade, have obtained on credit from any other person any goods or chattels, with intent to defraud the owner thereof, or with the like intent have removed, converted or disposed of any goods or chattels so obtained, knowing them to have been so obtained; he is guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.

SECTION III.

Of the Examination of the Bankrupt.

The bankrupt, as we have already seen,⁵ by the 32nd section of the 5 & 6 Vict. c. 122, is required to *submit* to be examined before the commissioners from time to time upon oath; and if upon such examination he shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when, he disposed of, assigned, or transferred, any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bonâ fide* before sold, or disposed of, in the way of his *trade*,⁶—or laid out in the ordinary

¹ Ex parte *Jackson*, 2 D. & C. 458.

² Ex parte *Thomas*, Mont. & M. 64.

³ Ex parte *Hawkins*, Mont. & M. 115.

⁴ Section 36. *Norris v. Levy*, 2 Blac. 1188.

⁵ Ante, 507, and see 6 Geo. 4, c. 16, s. 36.

⁶ This exception is copied from the 5 Geo. 2, c. 30, s. 1,—and

expense of his family,)—or if he shall not, upon such examination, deliver up to the commissioners all such part of his estate, and all books, papers, and writings relating thereto, as are in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children)—or if he shall remove, conceal, or embezzle any part of his estate, to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors,—every such bankrupt, “*in case of any default or wilful omission*”¹ in any of these particulars, will be deemed guilty of felony, and liable to be transported, or imprisoned, for the same term,² as in the case of his not surrendering to the commission.

When the bankrupt had surrendered to his commission, it was decided, before the new act, that the *mere refusal* to answer certain questions would not render him liable to be convicted of felony, notwithstanding such refusal proceeded from an intent to defraud his creditors.³ But now, if those questions were connected with the discovery of his estate and effects, his refusal to answer them might, it should seem, be evidence of his intent to defraud his creditors, upon an indictment for embezzling his property, within the meaning of the above section. It has been held, however, that where the last examination of the bankrupt was not completed, but was adjourned *sine die*, the bankrupt could not be indicted for concealment of his effects.⁴

The commissioners may also (as we have already seen)⁵ by the 36th section of the new act, at any time, either

Mr. Cullen, in his able treatise on the former bankrupt laws, very judiciously remarks that there seems to be some inaccuracy with respect to the first part of the exception, if considered (as it is expressed in the statute) to be an exception merely as to *discovery*. The meaning, he says, of the latter part of the exception is obvious, viz., that a general account of the gross sums laid out in family expenses is sufficient, without its being necessary to go into the particular items. But to dispense with the discovery of such part of his estate and effects, as shall have been *sold* in the way of *trade*, seems unintelligible in itself, and

inconsistent with the other parts of the clause. The exception was found for the first time in the 5 Geo. 2, which, he thinks, is not the only instance of a variation without improvement from the former statute of the 5 Geo. 1. See Cull. Princ. B. L. 343.

¹ These words are not in the act, but it would seem that they ought to have been inserted. And see Eden, B. L. 560, note (*d.*)

² The punishment was death under the 5 Geo. 2, c. 30.

³ *Rex v. Page*, 1 B. & B. 308. 3 Moore, 656. 7 Price, 616.

⁴ *Rex v. Walters*, 5 C. & P. 139.

⁵ *Ante*, page 149.

before or after the bankrupt has obtained his certificate,¹ examine him upon oath, either by word of mouth, or on interrogatories in writing, touching all matters relating to his trade, dealing, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his estate or effects, and to reduce his answers into writing, which the bankrupt is required to sign. And if he shall refuse to answer any such questions of the commissioners, or not fully answer to their satisfaction, or shall refuse to sign his examination, the commissioners may then commit him by their warrant to prison without bail, until he shall submit himself to their authority.

Where the bankrupt, after attending the last meeting before the commissioners, immediately absented himself without passing his last examination, the court, on his petition, ordered a fresh meeting for that purpose.²

By 5 & 6 Vict. c. 122, s. 23, the commissioners may, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, *adjourn* such examination *sine die*; in which case the bankrupt will be free from arrest or imprisonment for such time (not exceeding three calendar months) as they shall, by indorsement upon the summons, appoint.³ Where the last examination is adjourned *sine die*, the court will not order the commissioner to appoint a time, unless misconduct be charged against him, or the bankrupt can show that serious injury will accrue.⁴ It is irregular in the assignees to get an *ex parte* order to enlarge the time for the bankrupt's last examination;⁵ but it seems that in one case such an order was made—the assignees consenting—though the bankrupt had absconded *after surrendering* to the commission.⁶

The better to enable the bankrupt to finish his examination, he may (by 6 Geo. 4, c. 16, s. 116,) at all seasonable

¹ See 14 Ves. 449. *Ex parte Bradley*, 1 Rose, 202.

² *Ex parte Dixon*, 1 D. & C. 351.

³ And see *Rex v. Perrott*, 2 Burr. 1122. *Davis v. Trotter*, 8 T. R. 475. *Ex parte Hawkins*, 4 Ves. 691.

⁴ *Ex parte Perkins*, 1 M. & A. 524.

⁵ *Ex parte Dayrie*, 1 G. & J. 281.

⁶ *Ex parte Parr*, 1 Mont. Dig. 113. Quære, whether (under the words of the 112th section) a bank-

rupt could in such a case be convicted of felony, the first part of the section (which relates to the surrender, the signing such surrender, and submitting to be examined,) being entirely copulative, and constituting one entire duty, the *whole of which*, according to the principle of *Rex v. Page*, ante, 514, must be *omitted*, in order to render him liable to a conviction for felony.

times after he has surrendered, and before the expiration of the time allowed him to finish his examination, inspect his books, papers, and writings, in the presence of his assignees, or any person appointed by them, and bring with him, each time, any two persons to assist him. And the assignees cannot refuse the bankrupt such an inspection of his books, whatever his object may be; for neither they, nor (as it seems) even the lord chancellor, have any discretion either to permit or refuse such inspection.¹

If, however, (by 5 & 6 Vict. c. 122, s. 34,) the bankrupt after the commission of any act of bankruptcy, or in contemplation of bankruptcy, or, with intent to defeat the object of the bankrupt law, shall have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or have made, or been privy to the making of, any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, he is guilty of a misdemeanor, and is liable to be imprisoned for any term not exceeding three years, with or without hard labour.

If the bankrupt is in prison, he may, as has been already stated,² be brought before the commissioners to be examined; and the assignees may appoint any persons to attend him from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects previous to his final examination and discovery thereof. A copy of this statement the bankrupt is required to deliver to the assignees ten days at least before his last examination.

And the balance-sheet must be filed in duplicate with the deputy-registrar of the court, ten days at least before the day appointed for the last examination, or the adjournment day for that purpose,—one copy for the official assignee, and the other for the proceedings,—otherwise the court cannot pass his last examination. Office copies of the balance-sheet, or of such part thereof as shall be required, are to be provided by the proper officer.³

Where the bankrupt's books were in the office of a master of the court of chancery in Ireland, and the assignees required the production of them, the expense of procuring them was ordered to be paid out of the estate.⁴

¹ Ex parte *Ross*, 1 Rose, 33. 17 Ves. 374.

² Ante, page 569; and see section 119.

³ General Order of 12th Novem-

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ber, 1842, Rule 14, post, Append. and 3 M. D. & D. lvii.

⁴ Ex parte *Cridland*, 2 Rose, 164. 3 Ves. & B. 94.

The bankrupt is bound to answer all the questions of the commissioners relating to his property; and the whole of his conduct and behaviour in his dealings with it is subject to the strictest inquiry; for it is the duty of the commissioners to take care of the interests of all parties, and to examine the bankrupt fully, as to every matter connected with the disposal of his estate or effects.¹ And it seems to be contemplated by the legislature, that the bankrupt shall furnish to the commissioners at his last examination some *written* disclosure or discovery of his estate and effects: the uniform practice has been, certainly, conformable to this construction,—it being usual for the bankrupt to give in then some account in writing to the commissioners. This account should specify what debts are due *from* him, and what effects he then possesses, in addition to debts which are due *to* him,—what he has expended,—what his capital was,—and how that has been laid out, so as to account for the reason of his becoming a bankrupt.² The lord chancellor has, however, the *power* in his discretion to limit the examination of the commissioners to particular points, though such a power does not appear to have been exercised in the examination of the *bankrupt*; nor, indeed, does there seem any great necessity for the interposition of the chancellor's authority in this respect. For if the bankrupt objects to any question, he may demur to the interrogatories, and the lord chancellor will then judge of the question upon a petition.³ And if the commissioners are dissatisfied with any of the bankrupt's answers, and commit him in consequence, the lord chancellor, or any other of the superior tribunals, can in that case, upon *habeas corpus*, decide both upon the propriety of the question and the answer. Lord Hardwicke, in one case,⁴ made an order for limiting the examination of a person summoned before them (who was the mother of the bankrupt) to the point of the bankrupt's *trading*; but, in another case, he refused to restrain the commissioners from asking *certain questions* of a person so summoned.⁵

The examination of the bankrupt is not to be restrained, because his answers may subject him to certain penalties, which he has incurred by his conduct in particular transactions;⁶ and he cannot refuse to answer the inquiries of the

¹ *Nerot v. Wallace*, 3 T. R. 17.
Janson v. Wilson, Doug. 257. *Taylor's case*, 8 Ves. 331.

² *Per Abbott, C. J. Davis v. Mitford*, 4 B. & A. 365.

³ *Ex parte Meymot*, 1 Atk. 199.

⁴ *Ex parte Parsons*, 1 Atk. 204.

⁵ *Ex parte Bland*, 1 Atk. 205.

⁶ *Ex parte Meymot*, *supra*. *Ex parte Barr*, 1 C. B. L. 497.

commissioners, although his answers may *tend* to show that he has committed a criminal act.¹ Still less can he object to answer a question, because the answer would tend to establish an act of bankruptcy.² Nor can he refuse to answer the inquiries of the commissioners, on the ground that the creditors can derive no benefit from the examination,³ or that he intends to dispute the commission.⁴ But, if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it. Therefore, where a petition prayed, that the creditors might be at liberty to examine the bankrupt, whether he, or any person in trust for him, or for his benefit, had received, or were to receive, any sum of money, or other valuable consideration, for his having resigned, or as an inducement to resign, the office of town-clerk of the city of Bristol,—the petition was dismissed.⁵

So a person, to whom the bankrupt had sold goods for a price considerably lower than what he gave for them, is bound to answer the question, “to whom did you subsequently sell these goods?” for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bonâ fide*.⁶

The assignees, too, have no power by an agreement with the bankrupt, or any other person, (though made with the consent of all the creditors,) to stop the commissioners from examining the bankrupt as to certain points;—for the public, as well as the creditors, have a right to know how the bankrupt has disposed of his property. The creditors are only interested as far as respects the payment of their debts; but the public are interested in knowing, whether the bankrupt ought to be restored to his former credit, by obtaining his certificate. Therefore, where an agreement was made by a friend of the bankrupt, to pay a sum of money to the assignees, in consideration that they would forbear to proceed in the examination then about to be taken before the commissioners, with respect to certain sums of money, for which the bankrupt had not accounted—and that the commissioners would forbear and desist from

¹ *Ex parte Cossens*, Buck, 531.
Re Heath, 2 D. & C. 214. *Re*
Faahs, 2 D. & C. 226. *Re Smith*,
 2 D. & C. 203.

² *Pratt's case*, 1 G. & J. 58.

³ *Ex parte Nowlan*, 11 Ves. 516.

⁴ *Davis v. Mitford*, 4 B. & A. 366.

⁵ *Ex parte Cossens*, Buck, 531.
 And see *ex parte Kirby*, Mont.
 & M. 212

⁶ *Re Falk*, 2 D. & C. 415.

taking his examination to these points,—such agreement was held void, as being contrary to the object and policy of the bankrupt law.¹

SECTION IV.

Of the Bankrupt's Answers.

The bankrupt being, as has been already stated,² bound to answer *fully* any questions put to him by the commissioners, touching any matter to which he may be lawfully examined,—when he is required, therefore, to account for the disposal and application of large sums of money, and questions are put to him, which call for, and will admit of, full and particular answers, general answers will not be sufficient. For the better illustration of what is, and what is not, an insufficient answer in this respect, two or three cases will be given at somewhat greater length than the scope of this work has in general admitted of:—

John Perrot, upon his examination, had the following question put to him: “As you admit that you have spent the last week previous to your examination with Mr. Maynard (one of your assignees), to settle and adjust your accounts, and to draw up a state thereof, to enable you to close such your examination; and do likewise admit, that upon such state thereof it appears, that, after giving you credit for all sums of money paid by you, and making you debtor for all goods sold and delivered to you, from your first entering into trade to the time of your bankruptcy, there is a deficiency of the sum of 13,513*l.*;—give a true and *particular* account of what is become of the same, and how and in what manner you have applied and disposed thereof.” To this question the bankrupt refused to give any other than the following *general* answer: “On goods sold this last year I have lost upwards of 2000*l.*; and by mournings I have lost upwards of 1000*l.*; and for nine or ten years I have (and I am sorry to say it) been extremely extra-

¹ *Nerot v. Wallace*, 3 T. R. 17. But an agreement, by a friend of the bankrupt, to pay all the creditors their *full debts*, in consideration that they would not proceed any further under the commission, and would join in an application

to the lord chancellor to have it superseded, was held legal, and not contrary to the policy of the bankrupt law. *Kaye v. Bolton*, 6 T. R. 134.

² *Ante*, pages 159, 574.

vagant, and *spent large sums of money.*" The court of King's Bench held this to be a proper question, and the answer very insufficient¹ and unsatisfactory. The bankrupt, however, was afterwards (at his own instance) again brought before the commissioners; and, upon the same question being proposed to him, he particularized a woman upon whom he had spent 5000*l.* from December 1758 to December 1759, and also specified the times of sending and giving it to her; but stated that no person was privy to this, and that the woman, whose name was Sarah Powell, otherwise Taylor, was dead, as he had heard; that she knew him to be a bankrupt, and never returned the money or any part of it to him; and that he gave it to her for her maintenance and expenses, and not for a fund for her future support, or wherefrom he could draw any advantage; that he knew in the year 1759, when he gave and remitted those sums to her, "that he was not worth anything, and that he was remitting to her the money of his creditors;" that he was acquainted with her five or six years, but he could not recollect what he gave her, or spent upon her during the second, third, or fourth years of their acquaintance, nor did he keep any further account or memorandum thereof, either in those years, or in the year 1759, but that he spoke from memory only; that he did not take any of this money from his banker, but always took it from Mr. Thomson (since deceased), who used to sell goods for him; and that all letters between him and this woman, except one or two, were burnt or destroyed:—the court held this answer also incomplete and unsatisfactory, and ordered the bankrupt to be remanded.²

A bankrupt, however, may answer *to the best of his remembrance and belief*; and if he swears that he cannot positively answer further, it will be sufficient.³ What is a sufficient answer of this nature will be best explained by an able judgment of Lord Chief Justice De Grey's, in which he gives a lucid definition of the different grounds of recollection and belief. The questions put to the witness in this case were, first: "Did you purchase by a broker the two bales of silk?" Answer: "I cannot positively recollect whether I bought them of a broker or not." Secondly: "Can you form any belief whether you bought them by a broker or not?" Answer: "I should rather

¹ *Rez v. Perrot*, 2 Burr. 1122. see also *Langhorn's case*, 2 Blac.

² *Rez v. Perrot*, 2 Burr. 1215; 919.

³ *Perrot v. Ballard*, 2 Ch. Ca. 72.

believe I bought them by a broker." Thirdly: "Whether, or not, do you believe you bought the two bales of silk by a broker?" Answer: "I cannot give any other answer than I have already given; viz., I cannot positively recollect, &c., but I rather believe I did." Fourthly: "Whether by the words 'I should rather believe I bought them by a broker,' you mean, that you *do* believe the two bales of silk were bought by a broker; or whether you mean to say, you believe that the said two bales of silk were *not* bought by a broker?" The witness refused to answer this last question; and the commissioners committed him. Upon being brought up before the court of Common Pleas by *habeas corpus*, Lord Chief Justice De Grey said: "In the present case the witness had only two ways, or means, to enable him to answer the question put to him, either by *recollection* or *belief*; the first is *knowledge*, and must imply *consciousness*; but in some cases no traces of a fact remain in a man's memory, whereby he can recollect the fact: it is possible he may have lost all knowledge of it; and if he has, he can only answer that he doth not *know*, or cannot recollect the fact. A man may recollect to a certain degree; and though he cannot recollect at one time, he may at another. Suppose I may not, or cannot, *recollect*—yet I may and can *believe* I did a certain act, because you tell me you saw me do it;—then I *believe* I did it, because I give credit to you as a person of veracity. How is it in courts of justice, when a man swears that he neither *recollects* nor *believes* that he did such an act; or that he did, or did not, do it to the best of his *knowledge*, *remembrance*, and *belief*? This is certainly a full answer. A subscribing witness to a bond may swear that he has totally forgot he subscribed his name as a witness to it, and that he cannot swear positively that he saw the obligor seal and deliver the bond; but, seeing his own hand-writing subscribed as a witness to the execution of it, he may swear he *believes* he saw the obligor execute the bond; and such answer would be satisfactory to the court. Suppose a banker was upon examination asked, whether he paid such a bill in cash or notes—and he answers he cannot tell, but his books may inform him; if, on looking into his books, he sees by the hand-writing of his clerks, that the bill appears to have been paid in cash or notes, he then swears to his belief accordingly; but if his books be lost or destroyed, and his clerks are dead, or gone, and he then swears he cannot tell, or doth not know, whether the bill was paid in cash or notes, his answer is full, and ought to be taken as satisfactory. So a

merchant buying many goods may have forgot, and cannot *recollect*, or be able to swear, whether he bought a certain particular parcel and sort of goods by himself, or a broker." The court, therefore, in this case, held the above answers of the bankrupt to be sufficient; for as, upon the second answer, the witness would be liable to be convicted of perjury, if it could be proved that he himself bought the silk, and not a broker,—he had, consequently, sworn to a degree of *belief* sufficient to answer civil purposes.¹

It was formerly held by Lord Mansfield, that if a bankrupt swear fully and roundly,—though the commissioners have every reason to believe that what he swears is *not* true,—yet they must take it to be satisfactory, provided it would be satisfactory, in case it *were* true; and that, though they are convinced he has perjured himself, yet, if he answers fully, they cannot commit him for false swearing.² But there seems to be little reason or principle in this decision; and it has since been completely overruled;³—for it would, indeed, be a ridiculous ceremony which the commissioners would have to go through in examining a bankrupt, if they were bound to give credit to any account, however improbable or absurd, merely because he has the effrontery to swear to it. The question, therefore, in cases of this kind is, whether the answers given by the bankrupt be, or be not, sufficient to satisfy the mind of any reasonable man; for the rule does not hold now, that a *positive* answer must be taken to be satisfactory,—because the bankrupt may be indicted for perjury, if it is not true; but even an indictment for perjury cannot be supported, when the secret remains locked up in the bankrupt's own breast.⁴ And this doctrine has been recognized by Lord Eldon in subsequent decisions, where it is laid down, that the commissioners may properly inquire into the motive of a bankrupt's conduct, with a view to see whether the motive he assigns is so improbable, that they cannot believe him; and that the bankrupt's answer must be *full* in this sense—that it must be reasonably satisfactory⁵ to the mind that is to

¹ *Miller's case*, 3 Wils. 420.
2 Bl. Rep. 881.

² *Pedley's case*, Leach, 361.

³ Ex parte *Nowlan*, 6 T. R. 118, of which case see the Record, 2 Rose, 401; and see 11 Ves. 511. *Taylor's case*, 8 Ves. 328. Ex parte *Oliver*, 1 Rose, 407. 2 V. & B. 244. Ex parte *Cassidy*, 2 Rose, 217. 19 Ves. 334. 2 Swanst. 76.

⁴ Per Lord Kenyon, 6 T. R. 118.

⁵ The judgments of mankind, however, as to right and wrong, are found from experience to be so very different, and this too even among the most reasonable men, that it must often become a matter of great difficulty to decide what answer is or is not *sufficient to satisfy the mind of any reasonable*

decide.¹ When, however, a single question is followed by a direct answer, and is not afterwards followed up by any other examination respecting the transaction, which may have excited the suspicions of the commissioners, the answer must then be taken to be satisfactory. As where a bankrupt was asked, "Whether he had not, six months previous to the commission, executed two conveyances of his estate and effects, or part thereof, to his son?" and he answered, "Not to my knowledge:" this answer was held satisfactory, no further questions having been put.²

So, where the question put was, "Can you give any other account of your affairs?" to which the answer was, "None but that contained in the account given in this, and in my former examination;" Lord Manners ordered the bankrupt's discharge, saying, that the commissioners ought, by particularizing, to have called the bankrupt's attention to the parts of the account with which they were dissatisfied.³

And where the question is *not material* to the duty which the commissioners have to discharge, although the answer may not be satisfactory, the commissioners have not authority to commit.⁴

Where a question is put to a bankrupt embodying as a fact, what he said or did on the preceding day;—if he does not deny that he said or did so, or does not qualify it, the bankrupt must be taken to admit the fact alluded to in the question; because he must know whether he said or did so, or not.⁵ But his answering a question, embodying a statement relative to the acts of a *third person*, without denying or qualifying that statement, is not to be understood as admitting it.⁶

The commissioners cannot *delegate their authority* to the assignees, or any other person, to examine the bankrupt, and take his answer. For example,—a bankrupt was committed upon the following question and answer stated in the warrant of commitment: "You having stated to the commissioners heretofore, that if you were at liberty, and out of prison, you

man; for, as Sir William Evans has well observed in his Letter to Sir S. Romilly, "satisfactory and unsatisfactory answers approximate so nearly to each other, that the most acute legal metaphysics cannot supply a satisfactory criterion for distinguishing them."

¹ *Taylor's case*, 8 Ves. 328; and see *ex parte Oliver*, 1 Rose, 407. 2 Ves. & B. 244.

² *Norris' case*, 2 Jac. & W. 437. *Walker's case*, 1 G. & J. 371.

³ *Re Morris*, 2 Molloy, 448.

⁴ *Ex parte Baxter*, 7 B. & C. 673.

⁵ *Crowley's case*, 2 Swanst. 78. *Goddard's case*, 1 G. & J. 51. *Ex parte Nowlan*, 6 T. R. 118. *Re v. Perrot*, 4 Burr. 1122.

⁶ 2 Swanst. 1.

could find the several persons named by you in your balance-sheet as debtors to your estate—and being directed by the commissioners to communicate to your assignees how, or where such, or any of such, persons could be found; and T. C. (the assignee of your estate) having called upon you, and seen you in the Fleet prison for that purpose;—have you given him any such information? and if not, why not?" Answer: "I have not, and can give no reason why?" The bankrupt having obtained a writ of *habeas corpus*, Lord Eldon held the commitment bad in substance, saying: "If the bankrupt, answering to the direct questions of the commissioners, had said he could not, or he would not, tell, they would then have been authorized to commit him. The commissioners, however, have done this: 'We do not ourselves examine you; but, you being in prison, (a circumstance, however, perfectly immaterial,) we send the assignees to you, and now ask you, why you have not submitted to their examination, and answered to their satisfaction?' The answer is obvious: 'You have delegated persons incompetent to exact a submission, upon which you can commit.' The bankrupt is entitled to be discharged."¹

SECTION V.

Of Committing the Bankrupt, and herein of the Remedies for his Discharge.

The commitment of the bankrupt by the commissioners, for not submitting to their authority, is a criminal process;² and when such committal takes place, it must be by warrant under their hands and seals,³ and must be strictly according to form of law. Therefore, where a bankrupt, having been committed by one of the London commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before *two* commissioners, and committed by them to Newgate; it was held that the commitment was illegal, inasmuch as he ought to have been brought up and examined before a subdivision court, consisting of *three* commissioners, who must be all present at such examination, though they need not be unanimous in the sentence of

¹ *Ex parte Cassidy*, 2 Rose, 217. ³ Section 36, and see ante, page 19 Ves. 324. 576.

² *Re Taylor*, 3 East, 232.

commitment.¹ And by section 39 of the 6 Geo. 4, c. 16, if the bankrupt be committed for refusing to answer, or for not fully answering, the question put by the commissioners must be specified in the warrant, in order that the court, before whom the bankrupt may be subsequently brought, may judge whether it was a lawful question or not. But the warrant need not state that the questions related to the bankrupt's person, trade, &c., or that they were lawful questions; as it is sufficient if, upon the examinations, they appear to be so.² But though the present statute, like the former one,³ only directs the *question* to be specified, yet the courts have been hitherto very strict in requiring also the *answers* of the bankrupt, as well, indeed, as the whole of the examination connected with the cause of commitment, to be stated verbatim in the warrant, that they may be the better enabled to determine whether the bankrupt's answers are satisfactory or not.⁴ And it is probable that the courts will still require such answers, as are applicable to the immediate cause of commitment, to be stated in the warrant. It must be remembered, however, that (before the new act) the *warrant* was the *only source* from whence the judge could extract information whereupon to form his opinion about the validity of the commitment;⁵ which (as Lord Eldon observed) rendered it the more necessary to set out the whole of the examination. But now, as the court or judge, either on an application for a *habeas corpus*,⁶ or on the trial of an action in respect of the commitment,⁷ (if required thereto by the party committed, or by the defendant in the suit,) may inspect and consider the whole of the examination—a power which they did not possess before,⁸—the learned framer of the new act thinks, that the necessity of setting forth the whole of the examination may be in future dispensed with.⁹ The court or judge, however, is only authorized to look at the whole of the examination, “*if required by the party committed*,” and, therefore, it would seem, that if, upon application for a *habeas corpus*, the party committed does *not* require the court or judge to inspect the whole of the examin-

¹ Ex parte Lampon, 3 D. & C. 751.

² Ex parte Harrison, 1 B. & Ad. 410.

³ 5 Geo. 3, c. 30, s. 17.

⁴ Goddard's case, 1 G. & J. 55. Coombes' case, 2 Rose, 398. Brown's case, ibid. 400. Crowley's case,

2 Swanst. 80. Tomlin's case, 1 G. & J. 373.

⁵ Tomlin's case, 1 G. & J. 373.

⁶ Section 39.

⁷ Section 40.

⁸ Coombes' case, 2 Rose, 399.

⁹ Eden, B. L. 87.

ation, the necessity of setting it forth in the warrant will exist as much as it did before the passing of the act. And the author is confirmed in this construction of the clause by a recent decision of Lord Lyndhurst, where upon a motion for the discharge of a bankrupt, on the ground of the warrant not containing the whole of the questions and answers, he held that the authority so given to the court or judge was intended for the benefit of the prisoner, and did not abrogate the previous part of the clause, which required the commitment to state the whole of the question,¹ and that such authority was never meant to supply defects in the commitment, but to enable the prisoner to detect them, and to show to the court that the warrant, though in form good, was essentially bad.

In committing a bankrupt or other person for not answering satisfactorily, it is doubtful whether the commissioners should be influenced by extrinsic evidence; but if they are so influenced, the evidence should be fully read over to the bankrupt, before they can call upon him for an answer to the questions proposed to him in his examination.² Therefore, where it appeared in a warrant of commitment, that the commissioners, in the questions put to the bankrupt, had stated facts, of which they were informed by the deposition of the messenger—but the deposition was not set forth in the warrant, nor did it thereby appear to have been read over to the bankrupt at the time of his examination, the *effect* of it being only stated in the warrant;—Lord Eldon held that the commitment was substantially insufficient, and that this was not merely a defect in form.³ So, where a warrant referred to documents in a former examination, without setting them forth, so as to enable the judge to decide upon the same information as the commissioners possessed.⁴ And the like, where the warrant refers to, without setting forth, previous examinations.⁵ But the omission to do so does not vitiate a commitment upon a distinct ground.⁶

With respect to the previous examination of a third person, it has been decided, that although that examination is read over to the bankrupt or the witness, still it is not evidence for the formation of the judgment of the commissioners, but can be merely used as a brief, to enable them to interrogate the bankrupt or the witness.⁷

¹ *Re Lawrence*, 2 G. & J. 209.

² *Crowley's case*, Buck, 264.

³ *Swanst. l.*

⁴ *Ibid.*

⁵ *Price's case*, 2 G. & J. 211.

⁶ *Hooton's case*, 2 G. & J. 215.

⁷ *Atkinson's case*, 2 G. & J. 218.

⁸ *Re Goodwin*, Mont. 304.

When the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, or balance-sheet, which he had frequently referred to, as the only mode of explaining his trade and dealings, and the last adjournment was made upon his assurance, that he would produce such account, if further time was given,—the commissioners were held justified in committing him, when the account was not produced on the day to which the last adjournment was made, nor any satisfactory answer given by the bankrupt, explaining why it was not produced.¹

A single question followed by a direct answer, which question is repeated, but unvaried in terms, and not followed up by any other examination respecting the transaction, which may have excited the suspicions of the commissioners, does not (as we have already seen) afford grounds for a valid commitment; for the judge, who may have afterwards to decide upon such commitment, has no means of determining whether the answer is satisfactory, or unsatisfactory.² A commitment, therefore, is defective, if the commissioners do not examine with sufficient minuteness,³ and point out what answers are unsatisfactory.⁴

Where the examination of the bankrupt is adjourned by the commissioner to a subdivision court, that court cannot commit him, after merely asking, "Do you abide by your former answers?" but must re-examine him *de novo*.⁵

Where a bankrupt, after being committed for not answering satisfactorily, is again examined by the commissioners, and remanded in consequence of his answers not being more satisfactory than at first, there ought to be a supplemental warrant of commitment or detainer, stating what had passed in the way of question and answer at such *second* examination; and where this was omitted, Lord Eldon thought it substantial, and not a mere formal, defect.⁶ It is, however, no objection to a warrant, which recites several examinations, that it omits to mention that the bankrupt, who had been committed, was discharged at the conclusion of one of the⁷ examinations.

And where the bankrupt, upon the commissioners preparing to administer an oath to him, refuses to be sworn, or to

¹ *Goddard's case*, 1 G. & J. 45.
Davie v. Milford, 4 B. & A. 356.

² *Walker's case*, 1 G. & J. 371.
Norris's case, 2 Jac. & W. 437.

³ *Hooton's case*, 2 G. & J. 215.

⁴ *Ex parte Lee*, 2 M. & A. 15.

⁵ *Ex parte Bardwell*, 1 M. & A. 193.

⁶ *Coombes' case*, 2 Rose, 396.
Brown's case, *ibid.* 400.

⁷ *Bromley's case*, 2 Jac. & W. 453.

give any account of his property, the commissioners in this case need not in their warrant of commitment set forth any specific question; for this amounts to a refusal to answer all possible questions which can be suggested.¹ And when the bankrupt refused to be sworn, on the ground that his legal adviser had not arrived, and the warrant stated generally that he refused to be sworn, without adding the reason assigned by him for his refusal, that was held to be sufficient.²

As the statute only gives the commissioners the power to commit the party *until* he shall submit himself to be sworn, or full answers make, to their satisfaction, to such questions as shall be put to him, or until he shall sign and subscribe his examination, the warrant of commitment (which is in restraint of the liberty of the subject) must strictly pursue the words of the statute in the *conclusion* of it, otherwise the bankrupt will be ordered to be discharged. A commitment, therefore, of a bankrupt under the 36th section, "*until he shall conform to the authority of the commissioners,*" would be held bad; for though the word *conform*, instead of the word *submit*, might be well enough, being of the same sense,—yet the commissioners have *other authorities* besides that of *examining*, and it might not appear but that it required a submission to them in *other* respects.³ So, also, a commitment, "till he shall be discharged by due course of law,"⁴ or "for *misbehaviour*,"⁵ has been held bad; as well as one "for *prevarication*,"⁶ for he might prevaricate, and yet give a full answer at last. And a commitment, until he shall submit himself, "and full answer make to all such questions as may be put to him," seems to have been on one occasion⁷ thought insufficient; though in a recent case such a commitment was held⁸ good,—the court saying, that the questions must be intended to mean lawful questions. The proper conclusion, however, of the warrant seems to be, "until he shall submit himself to us, the said commissioners, and full answer make to the questions so put to him by us as aforesaid."⁹

Where a witness refused to read certain entries in a ledger, to which he had referred in his examination, but which he

¹ Ex parte Page, 1 B. & A. 568.

² Nobes v. Mountain, 3 B. & B. 233. 7 Moore, 39.

³ Bracey's case, 1 Salk. 348. Comb. 391. Bracey v. Harris, 5 Mod. 309.

⁴ Hollingshed's case, 2 Lord R. 851. Rex v. Nathan, 2 Str. 880.

⁵ Miller's case, 2 Bl. 882, 1144.

⁶ Rex v. Nathan, 2 Str. 880.

⁷ Miller's case, 3 Wils. 428. 2 Bl. 881.

⁸ Nobes v. Mountain, 3 B. & B. 233. 7 Moore, 39.

⁹ Miller's case, supra. Rex v. Perrot, Burr. 1122.

had not been called upon to produce, and he was committed "for refusing to answer a question;"—held, that the warrant was bad in substance and form, the request to read not being a question.¹

But the conclusion of a warrant ought to be so limited as to have direct reference to the offence imputed in the preceding part. Therefore, where a commitment, after reciting that the commissioners had examined the bankrupt touching his trade, &c., and caused the examination to be read over to him, to which examination he refused to sign his name, (not having a reasonable objection to the wording thereof or otherwise,) required the gaoler to detain him in custody "until such time as he should submit himself, and *full answer make, to the satisfaction of the commissioners, to all such questions as should be put to him*, and sign and subscribe such examination as aforesaid," was holden to be bad. For the commitment assumes that the bankrupt has not submitted to undergo any examination; whereas it ought to have recited the facts truly,—viz., that he had answered fully, but that he had refused to sign the examination, and to have concluded merely that he should be committed *till he signed it*; for, according to the above conclusion, the gaoler would be bound to detain the bankrupt until those things were done, which by the warrant it appeared the bankrupt had done, and so operate to detain the bankrupt for a longer period than the commissioners were authorized to commit him for.² But a commitment until such time as he shall *submit* himself to us, and shall sign or subscribe his examination, is not informal; for the *submission* of the bankrupt may be applicable either to making full answer, or to signing his examination. In *Ex parte Leake*, it extended to both, which rendered the commitment void; but in the present case, it was properly confined to the refusal to sign or subscribe.³

When the commissioners commit the bankrupt for not attending his assignees (when required) to assist them in making out the accounts of his estate, (as they are empowered to do under the 6 Geo. 4, c. 16, s. 116,) the warrant must also pursue the words of the section giving them such power. In this case, they are authorized to commit, "until the bankrupt shall conform to their satisfaction."

¹ *Ex parte Isaac*, 1 Mont. & M.
23. *Isaac v. Impey*, 10 B. & C.
442.

² *Ex parte Leake*, 9 B. & C. 234.
³ *Re Davidson*, Mont. & M. 443.

Where one of the reasons appearing upon the face of the commitment was illegal, although there was another set forth upon it which was good, yet, as the person was committed until he should submit also in the matter in which the commissioners had no authority, the commitment was held illegal *in toto*.¹ But this decision may be considered as doubtful; for it has been said, that where one cause of the commitment was manifestly illegal, *that*, perhaps, might be rejected as superfluous, and the commitment be referred to that cause, which, if true, was a legal one.²

It is no objection to the commitment, that it is made in the absence of the bankrupt; or that it is made some days after the examination took place, notwithstanding it bears date on the day of the examination.³ But where a warrant of commitment was dated by mistake 2nd March, instead of 2nd February, when the insufficient answers were given,—this was held a defect in substance, which the court could not amend.⁴

Though a commitment of a bankrupt is illegal, (for not answering a particular question, the answer to which would directly criminate himself,) yet, if his answer would only *tend* to show that he has committed a criminal act, it seems that a committal would then be good for not answering the question.⁵ And if a bankrupt *absolutely refuse* to account for part of his effects, on the ground that his answer to the inquiries of the commissioners would criminate himself, he may nevertheless be legally committed for such refusal,⁶ on the ground that his answer is *unsatisfactory* within the language of the act.

But the commissioners cannot dispense with the general rule of law, that no person can be compelled to criminate himself; and although part of the question proposed may be free from this objection, yet if it is blended with part, which, if taken separately, the bankrupt cannot be compelled to answer, the bankrupt may demur to answer the question. Therefore, where a bankrupt was asked whether the statements contained in a written paper, produced and shown to him, were true statements, and he demurred to the question, on the ground that his answer might expose him to a criminal prosecution; it was held that he was entitled to demur

¹ Ex parte *James*, 1 P. Wms. 610.

² *Miller v. Seare*, 2 Bl. 1141.

³ *Batty v. Gresley*, 8 East, 327.
Salt's case, 13 Ves. 361.

⁴ Ex parte *M'Gee*, 6 Madd. 206.

⁵ Ex parte *Cossens*, Buck, 531.

⁶ Ex parte *Oliver*, 1 Rose, 407.

to a question in so general a form, and was discharged from a commitment for not answering this question.¹

In a recent case, where the bankrupt (who had been committed for not answering satisfactorily) applied for a *mandamus* to examine him, professing his readiness to make the disclosures required, the court of King's Bench granted the writ, but directed that it should not issue without an order from a judge, after the bankrupt had suggested the grounds upon which he desired to be further examined, and the refusal of the commissioners to examine him.² But in a later case, where a party committed by the commissioners for not answering to their satisfaction, applied for a *mandamus* to be brought before them again to be further examined;—the court said, that as the party was committed for his own misconduct, they would not grant a *mandamus*, which would throw upon the estate of the bankrupt the costs of his being brought again before the commissioners, but that he might, if he thought fit, apply for a *habeas corpus*.³

The same party afterwards applied by petition to the lord chancellor, when an order was made that he should be again brought before the commissioners, on tendering to the solicitor under the commission the costs of the meeting, and of being brought up.⁴

The proper remedy for the bankrupt to pursue, when he is illegally committed by the commissioners, is either to present a petition to the court of review,⁵ or to apply to the lord chancellor, or one of the judges of the courts at Westminster, for a *habeas corpus*.⁶ This writ may be moved for by him, as well as by any other party who is committed by the commissioners, and who thinks himself improperly dealt with; and it is returnable either before the lord chancellor, or any of the superior courts at Westminster in term time, or before any of the twelve judges⁷ in vacation. But the writ will be refused, if it appears that the bankrupt's answers were unsatisfactory.⁸ It was formerly supposed, that the lord chancellor could not issue the writ at common law in vacation;⁹ but Lord Eldon decided that the chancellor, as

¹ Ex parte *Kirby*, Mont. & M. 212.

² *Bromley's case*, 3 Dow. & R. 310.

³ Ex parte *Baxter*, 8 B. & C. 344.

⁴ Ex parte *Baxter*, 1 Mont. & M. 16.

⁵ Ex parte *Jones*, 1 M. & A. 704. 4 D. & C. 536.

⁶ *Taylor's case*, 8 Ves. 328. Ex parte *Tomkinson*, 10 Ves. 106. Ex parte *Hyams*, 18 Ves. 237.

⁷ See 43 Geo. 3, c. 140.

⁸ Ex parte *Knight*, 2 Mees. & W. 106.

⁹ *Jenks' case*, 7 Harg. St. Tr. 467.

well as the judges, had authority to do so.¹ And, whenever the writ is returnable before the lord chancellor, he exercises jurisdiction, not as sitting in bankruptcy, but as a law officer having a right to issue the writ. The vice-chancellor seems, in one case, to have discharged on *habeas corpus*.² Care should be taken that a correct return is made to the *habeas corpus*; for on the application of the bankrupt's discharge, the lord chancellor will not go out of the return.³

Notice of the application for the writ of *habeas corpus* should, in general, be given by the bankrupt to the assignees; though there may be some cases, where the right to be discharged is so clear, that it may be done at once. Where notice, however, is necessary, a notice given on Saturday afternoon for Monday has been held insufficient.⁴

The commissioners may, after the issuing of the writ of *habeas corpus*, and before the return to it, make (if necessary) a fresh warrant, stating more fully the cause for detaining the bankrupt in custody; and such warrant may, by words of reference, incorporate the formal parts of the first warrant.⁵

When the *habeas corpus* is returned, the court has to exercise its discretion, in deciding whether the answer of the bankrupt is satisfactory, or not; and if it believes the statement which the commissioners have disbelieved, it will, of course, order him to be discharged.⁶ But the court has no authority to receive *affidavits in explanation* of the party's conduct and answers before the commissioners,—but only to inquire into the validity of the cause of the commitment, as stated on the face of the return.⁷ The court will, therefore, not discharge a bankrupt, merely upon his producing affidavits that he *had made* a discovery of his estate and effects, when he was committed for not answering and making such discovery; for if the statement in the commitment be untrue, he may bring an action of false imprisonment.⁸ Nor is the bankrupt to be discharged, because the return to the writ sets forth the warrant of commitment imperfectly. In such a case the lord chancellor, before he enters upon the question of the validity of the committal, will ascertain whether the warrant is truly set forth in the return; and if

¹ *Crowley's case*, Buck, 264.

² *Ex parte M'Gee*, 6 Madd. 206.

³ *Crowley's case*, 2 Swanst. 75.

⁴ *Bromley's case*, 2 Jac. & W. 453.

⁵ *Ex parte Page*, 1 B. & A. 568.

⁶ *Ex parte Oliver*, 1 Rose, 407.

⁷ *Ex parte James*, 1 Chit. Rep. 110.

⁸ *Gregory's case*, 5 Mod. 368; and see *Miller v. Seare*, 2 Bl. 1141.

it is not truly set forth, he will order the return to be rescinded.¹

Where the bankrupt was detained as a prisoner in the Fleet in several actions, and was committed by the commissioner, by a warrant addressed to the keeper of Newgate, which was delivered to the warden of the Fleet; it was held that the bankrupt was not in the custody of the warden under the warrant, and that the court, therefore, could not, on *habeas corpus*, inquire into its validity.²

On an application for the bankrupt's discharge, an affidavit may be read, stating circumstances which are not set forth in the warrant of the commissioners.³ Where the bankrupt is discharged on *habeas corpus* for an irregular commitment by a subdivision court, after a commitment by a commissioner to the messenger, he is not to be remanded to the custody of the messenger, although the commitment by the commissioner was regular in the first instance.⁴

If, upon the return of the *habeas corpus*, any insufficiency appears merely in the *form* of the warrant, by its omitting to specify any question put by the commissioners,—the court or judge, before whom the party shall be brought, may (and is indeed required by the statute⁵) to recommit him, unless he can show that he has fully answered all lawful questions put to him by the commissioners; or (if he was committed for refusing to be sworn, or for not signing his examination,) unless it shall appear to the court, or judge, that he had a sufficient reason for the same. And, as has been already observed,⁶ in case the whole of the examination shall not have been stated in the warrant of commitment, the court or judge is directed (if required thereto by the party committed) to inspect and consider the whole of the examination,⁷ whereof any such

¹ *Re Power*, 2 Russ. 583.

² *Ex parte Garcia*, 3 Bing. N. C. 299. 3 Scott, 662. *Ex parte Knight*, 2 Mees. & W. 106.

³ *Ex parte Lampon*, 3 D. & C. 751.

⁴ *Ex parte Bardwell*, 1 M. & A. 214.

⁵ Section 39; and see *ex parte Page*, 1 B. & A. 568.

⁶ *Ante*, 586.

⁷ Lord Eldon in his judgment in *Coombes'* case, 2 Rose, 399, intimated, that there would be some difficulty, when the application for a discharge upon a *habeas corpus* is made to a judge at chambers, in

regard to the mode by which the judge could look into the proceedings, as there was some doubt, with respect to his power to compel the production of them. But now, as the statute expressly directs the judge, if required thereto by the party committed, to inspect the whole of the examination, for the purpose of considering whether he has answered satisfactorily or not, it is submitted that, as a necessary consequence of this provision, the judge must now be clothed with the power of ordering the production of that which he is directed by the legislature to inspect.

question was a part; and if it shall then appear that the answer of the party committed is satisfactory, the court or judge may, in that case, order him to be discharged.

What are considered matters of *form*, and what of *substance*, in the construction of the warrant of commitment, may be collected from some of the preceding cases. In one of these, where the bankrupt refused to be sworn, and the warrant committed him till he should full answer make to the questions "*put to him as aforesaid*,"—no questions having been previously set out,—this inaccuracy was held to be mere matter of *form*, which would justify the court in recommitting the bankrupt.¹ So, where the warrant set out several questions, to some of which, taken singly, the answers were satisfactory,—it was considered no valid objection, that the warrant committed the party till he should full answer make "*to the questions so put to him as aforesaid*."² These are two instances of insufficiency merely in the *form* of the warrant. The above-noticed case of *ex parte Cassidy*³ (where it appeared on the face of the warrant, that the commissioners had improperly delegated their authority to other persons to examine the bankrupt) will explain what is considered a defect in *substance*.

If a bankrupt or witness, committed by a subdivision court for refusing to answer, obtain a *habeas corpus* to be brought again before the court, and give notice that he is ready to answer, he is not entitled to a meeting for that purpose, without paying the costs of the sitting, although he make affidavit of his inability to pay.⁴

The commissioners, having a *discretionary* power to commit the bankrupt, if his answers are not satisfactory to themselves, are not liable to an action for so committing him, notwithstanding he is in fact discharged afterwards by *habeas corpus*, on the ground of the court thinking the answers to be satisfactory;⁵ though the contrary of this decision was formerly held.⁶ Neither will any action lie against them for a commitment, which is bad only for a *formal* defect in the warrant.⁷

When a bankrupt is committed for not answering, and is afterwards desirous to complete his examination, and be discharged, he must send word to the commissioners that he is

¹ *Ex parte Page*, 1 B. & A. 569.

² *Ex parte Vogel*, 2 B. & A. 219.

³ *Ante*, page 585.

⁴ *Re Stockwin*, 5 Ad. & E. 266.
⁶ *Nev. & M.* 813.

⁵ *Doswell v. Impey*, 1 B. & C. 163; and see *ante*, page 161.

⁶ *Miller v. Seare*, 2 Bl. 1141.

⁷ *Bracey's case*, Comb. 391.

willing to submit and answer the questions, and the commissioners will then appoint a meeting at the expense of the estate; for the bankrupt has no estate, or, at least, is supposed to have none.¹ And where, in such a case, the bankrupt applied to be brought before the commissioners, but the assignees refused, unless he would pay the expenses of the meeting,—the lord chancellor directed, that if there were no effects, the commissioners should meet *gratis*, receiving their fees out of future effects, if there should be any; and added, that if the bankrupt should be again committed for not answering fully, he would find it very difficult to obtain another order to bring him up.²

If any gaoler, to whose custody the bankrupt or any other person shall be committed by the commissioners, shall suffer either the one or the other to escape,³ he is liable to a penalty of 500*l*.

SECTION VI.

Of the Bankrupt's Rights and Privileges.

SECT. 1. *Of his Privilege from Arrest.*

2. *Of his Maintenance during his Examination.*

3. *Of his Allowance under the Commission.*

4. *Of his Right to the Surplus.*

5. *As to his Right to acquire Property before obtaining his Certificate.*

(And see further "*Supersedes*," "*Certificate*," "*Actions by an uncertificated Bankrupt*.")

1. *Of the Privilege of the Bankrupt from Arrest.*

By the 5 & 6 Vict. c. 122, s. 23, the bankrupt is declared to be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the time limited for such surrendering for the period of sixty days from the publication of the advertisement in the *Gazette*, and also for such further time as shall be allowed him for finishing his examination, and for such time after finishing

¹ *Rex v. Jackson*, 1 T. R. 654.
Ex parte *Graham*, 2 Bro. 48.

² Ex parte *Cohen*, 18 Ves. 294.

³ Section 38.

his examination until his certificate be allowed and confirmed, as the court authorized to act in the prosecution of the fiat shall from time to time, by indorsement upon the summons, think fit to appoint, provided he was not in custody at the time of such surrender. If the court should adjourn his last examination *sine die*, he is in such case free from arrest for such time, not exceeding three months, as such court shall from time to time by indorsement upon the summons appoint. And if he should be arrested for debt, or on any escape-warrant,¹ in coming to surrender, or shall after his surrender be so arrested within either of the before-mentioned periods, he is entitled (on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving him a copy thereof) to be immediately discharged. If the officer shall afterwards detain him, he is liable to a penalty of 5*l.* for every day of such detention, to be recovered by the bankrupt for his own use, by action of debt in his own name, in any court of record at Westminster, with full costs of suit.

And though a bankrupt may have been apprehended by the warrant of the commissioners, for any refusal to submit to their authority, or any nonconformity to the provisions of the act of parliament,—yet, if he shall (within the time allowed him to surrender) afterwards submit to be examined, and in all things conform, he will be entitled to the same benefit under the act as if he had voluntarily surrendered.² It is also immaterial whether the bankrupt surrender at a private or a public meeting of the commissioners; for he is in either case, after his surrender, equally entitled to his privilege from arrest.³

If the bankrupt be in prison at the time of his surrender, he is, of course, not protected from subsequent detainers; for the above section only gives him the privilege of freedom from arrest or imprisonment,—provided he is *not in custody* at the time of his surrender.⁴

A bankrupt cannot apply to be discharged under the lords' act before he passes his final examination,—and then he must insert in his schedule an assignment to the plaintiff of all his estate, &c., subject to the commission, and the payment or satisfaction of his debts under it.⁵

This privilege of freedom from arrest is intended to enable

¹ That is, an escape-warrant at the suit of a creditor. 14 Ves. 41.
1 B. & A. 311.

² Section 115.

³ Ex parte Wood, 1 Rose, 46.

⁴ Ex parte Goldie, 2 Rose, 343.

⁵ Nunnay v. Hall, 8 Moore, 423.

the bankrupt to surrender himself to the commissioners, as well as to encourage him the more speedily to do so,—and is not a general and independent privilege, during the whole time allowed by the act of parliament for the surrender. Therefore, until actual surrender, the privilege is confined to the act of his going with that object. Thus, if a bankrupt be abroad, and returns with an intention to surrender, and is arrested on his landing, or within a day or two after his arrival, before he can conveniently make his surrender,—he will be entitled to the privilege, if it appears that he was actually going to surrender.¹ So, where a bankrupt was arrested in London, and it appeared that he was *bonâ fide* on his way from Bath to Liverpool, for the purpose of examination before the commissioners,—he was discharged by Lord Eldon, upon motion.² But, where a bankrupt came from Holland to England within the forty-two days, with an intent to surrender himself upon the forty-second day—but, finding that his time for surrender was enlarged to a further day, he then laid aside his design of surrendering himself upon the forty-second day, and did *not, in truth, mean to surrender until the enlarged day*,—and in the intermediate time was arrested by one of his creditors,—it was held, under these circumstances, that he was not entitled to this privilege.³ Where a bankrupt, however, before he received a summons from the commissioners, delivered his keys and effects to the messenger, and promised to submit to the directions of the law—and, only an hour after he had been served with the commissioners' summons to surrender, was arrested;—upon petition to the lord chancellor to be discharged, it was considered in this case, that what the bankrupt had already done was all that he could then do, and was, so far, a compliance with the requisitions of the bankrupt law;—he was, therefore, ordered to be discharged, upon his consenting not to sue the officer who arrested him.⁴

When the bankrupt *has* surrendered, his privilege continues from that time until and during the whole of the forty-second day; ⁵—or, if the time for his surrender has been enlarged by the lord chancellor, and he then duly surrenders, and the commissioners enlarge the time for his *examination*, his privilege will continue during the whole of such enlarged time (not exceeding three calendar months) as the commis-

¹ *Kenyon v. Solomon*, 1 Cowp. 156.

² *Ogle's case*, 11 Ves. 556.

³ *Kenyon v. Solomon*, 1 Cowp. 156.

⁴ *Ex parte De Fries, Davies*, 163.

⁵ *Ex parte Donlevy*, 7 Ves. 317.

Ex parte Davies, Buck, 80.

sioners shall by indorsement upon the summons appoint.¹ And the same, if the commissioners enlarge the time for his examination (after he has surrendered) within the forty-two days.² And though the commissioners omit to insert in their certificate of the surrender the *actual day* until which the examination is adjourned, the bankrupt is still entitled to his privilege; for his protection is granted by the statute, independently of the commissioners' certificate.³ But commissioners cannot give the bankrupt a protection for an *unlimited* period of time beyond three calendar months, in order to enable him to make a full disclosure of his estate and effects.⁴ The omission by the commissioners to indorse the adjournment of the bankrupt's last examination on his summons, will not deprive him of his privilege.⁵ And where a bankrupt's last examination has been adjourned *sine die*,—if at a meeting under the commission for a distinct purpose, and without a summons, he voluntarily attends in order to be examined, and is there arrested,—he is entitled to be discharged on general common law principles: viz. as a witness, or party, attending the commissioners.⁶ But where the last examination is adjourned *sine die*, on the ground that the commissioners consider all further examination useless,—and during the adjournment, and before any further meeting is had, the bankrupt is arrested,—he will not in this case be entitled to be discharged;⁷ unless, indeed, the commissioners have (pursuant to the 118th section) indorsed a protection on the bankrupt's summons; and this protection will not extend beyond three calendar months. Therefore, when the commissioners committed a bankrupt without a protection, after the forty-two days, and upon his afterwards applying to be brought up to be re-examined by the commissioners, they fixed a particular day for that purpose, and a detainer was lodged against him between the time of applying to be re-examined and his examination, such detainer was held to be legal, though made by one of his assignees.⁸

¹ Section 118; and see *Simpson's* case, Buck, 424. 2 Wils. 127. Ex parte *Hawkins*, 4 Ves. 691.

² *Simpson's* case, *supra*. *Davis v. Trotter*, 8 T. R. 476. *Darby v. Baughan*, 5 T. R. 209; and see re *Dalton*, 1 Ball & B. 130.

³ Ex parte *Leigh*, 1 G. & J. 264. *Price's* case, 3 V. & B. 23.

⁴ Section 118, *ante*, 515; and see *Cloughton v. Leigh*, 1 B. & C. 652. Ex parte *Woods*, 1 G. & J. 75.

⁵ *Price's* case, 3 V. & B. 23.

⁶ Ex parte *Ross*, 1 Rose, 260.

⁷ Ex parte *Woods*, 1 G. & J. 75.

⁸ Ex parte *Wright*, 2 G. & J. 202. The two sections, 117 & 118, of the new act taken together amount to this—that if the commissioners adjourn to a day certain, he is protected by the statute; if *sine die*, then only if the commissioners give him a protection.—*Per Lord Eldon*, *ibid.* 206.

Where the time for the bankrupt's surrender had expired, and he had obtained an order of the lord chancellor for the commissioners to be at liberty to meet and take his surrender, and he was afterwards taken in execution;—Lord Eldon, upon his application to be discharged, said it was a new case, and doubted his own authority to make the order, as the bankrupt was not strictly *coming to surrender according to law*; and he added, that if he made any order for the bankrupt's discharge, it must be upon the plaintiff in the action, and not upon the gaoler.¹

After the bankrupt has passed his final examination, if he is summoned by the commissioners to attend them upon declaring a dividend, or for any other purpose, he is equally protected with all other persons who may be examined before them, *cundo, redeundo, et morando*; for the bankrupt, or person so summoned, is to be considered in the character of a witness, or party attending a legal tribunal, sitting in the nature of a court in the administration of justice.² But if the bankrupt, or any other party, comes voluntarily before the commissioners, without a summons, and without any *necessity* for his so doing, he will then not be privileged³ *cundo et redeundo*.

A bankrupt is entitled to the privilege of a party attending his own cause, in freedom from arrest, on his return from attending his petition for leave to surrender, after the time originally appointed for his surrender has expired,—provided he deviates no further, than to call on his solicitor to arrange the proper steps for giving effect to the order.⁴

And whether the debt, upon which a bankrupt is arrested, is, or is not, proveable under the commission, he is equally entitled, in all the cases before mentioned, to the privilege from arrest.⁵ The privilege also extends to an arrest on a *capias utlagatum*,⁶ or to an attachment for not paying money under an award, which has been made a⁷ rule of court, or for not lodging money in court, pursuant to a decree or order of the court of Chancery.⁸ For, though the form of the process be criminal, yet if it issue to compel payment of a debt, it will be as much an arrest within the meaning of the statute, as every other mode by which a creditor can arrest a bankrupt for a debt.⁹ And where the lord chancellor directed an action

¹ Anon. 15 Ves. 1.

² *Arding v. Flower*, 8 T. R. 534.

³ Anon. 2 Salk. 544. Ex parte Ross, 1 Rose, 260.

⁴ Ex parte Jackson, 15 Ves. 116.

⁵ *Darby v. Baughan*, 5 T. R. 209.

⁶ Ex parte *Helsby*, Mont. 355.

⁷ Deac. & C. 16.

⁸ Ex parte *Parker*, 3 Ves. 554.

Ex parte *Jeyes*, 3 D. & C. 764.

⁹ *Wall v. Atkinson*, 2 Rose, 196.

¹⁰ Re *M'Williams*, 1 Sch. & Lef. 169.

to be brought by the bankrupt against the assignee to try the validity of the commission, and the bankrupt (having failed in the action) was taken in execution for the costs, he was, on petition to the chancellor, ordered to be discharged.¹

When the arrest is illegal, all *detainers* are inoperative, and the bankrupt will be discharged from them; for it is the arrest alone that gives any efficacy to the detainers.² But where a bankrupt was committed for a contempt, in not having obeyed an order of the lord chancellor to bring into the master's office the title-deeds of an estate sold under the commission—and the sale having been unduly made, the bankrupt was ordered to be discharged from that commitment—but detainers having been lodged against him, he petitioned also to be discharged from those detainers;—Lord Eldon, after consulting with two of the judges, held that these subsequent detainers must stand,³ according to the practice of the law.

Where a bankrupt escaped out of the custody of the marshal of the King's Bench, and surrendered to a commission subsequently issued, being then at large,—a surrender, under these circumstances, was held not to operate as a protection against the right of the marshal to retake him, and retain him in custody.⁴

It was formerly considered, that a bankrupt was not privileged from arrest upon an *extent*, even whilst under examination, as the Crown was not bound by the bankrupt acts. But it has been more recently held, that, although the Crown was clearly not bound by the statutes in bankruptcy, the bankrupt was privileged from arrest whilst in actual attendance before the commissioners; for that the spirit of the common law affects the Crown equally with any other creditor; and the principle is, that all witnesses are protected in attending a court competent to enforce their attendance.⁵ If, however, the bankrupt be arrested at the suit of the Crown, when not in actual attendance before the commissioners, or on his way to or from them, he is in this case not entitled to be discharged from such arrest,—although the commissioners

¹ Ex parte *Gregory*, 1 G. & J. 177.

² Ex parte *Ross*, supra. Ex parte *Moore*, Buck, 521. Ex parte *Hawkins*, 4 Ves. 691. Ex parte *Wilson*, 1 Atk. 152; but see *Barclay v. Faber*, 2 B. & A. 743, contra, where the party arrested was not privileged at the time of the arrest.

³ Ex parte *Dumbell*, 10 Ves. 328.

⁴ *Anderson v. Hampton*, 1 B. & A. 308. Ex parte *Johnson*, 14 Ves. 36.

⁵ Ex parte *Russell*, 1 Rose, 278. 19 Ves. 163.

have, in fact, enlarged the time for his examination, and extended his protection.¹ When the bankrupt is entitled to be discharged from an arrest at the suit of the Crown, the order of discharge will be made on the gaoler, who has the bankrupt in custody.²

A bankrupt, however, may be taken by his *bail*, even whilst attending to pass his examination, so as he is not taken away from the commissioners before his examination is finished; for the statute expressly excepts the case, where the bankrupt is in custody at the time of his surrender; and a defendant is always considered in law to be in the custody of his bail.³ But in the case of bail to the sheriff on an *arrest*,—that is not a custody within the strict meaning of the statute, at least, while the bail permit the principal to go at large,—whatever it might be if they kept him in their *actual custody*.⁴ Lord Hardwicke, in a case of this kind, observed, that he did not know that bail, taking their principal coming to a court of justice to be examined as a witness, had ever been determined to be guilty of a contempt of the court, provided they brought him to be examined by that court.⁵ The courts, however, have sometimes (upon application of the bankrupt) enlarged the time for his surrendering in discharge of his bail, in order that he might pass his examination before such surrender.⁶ But as the commissioners have now authority to have the bankrupt brought before them to be examined, whether he is in custody upon mesne or upon final process, there does not seem to be any necessity henceforth for such an application; the object of which was to prevent the inconvenience and expense of the commissioners attending the bankrupt in prison to take his examination, as they were formerly obliged to do when he was charged in execution.⁷ The court of Exchequer, however, have made an order of this kind since the commissioners have possessed the authority to have the bankrupt so brought before them⁸—a power which was first given them by the 49 Geo. 3, c. 121, s. 13. But the court of Common Pleas has refused to make such an order.⁹ But where the commission was worked at Liverpool, the King's Bench granted the bail time to surrender; as the

¹ Ex parte *Temple*, 2 Rose, 22.

² 1 Rose, 278. 19 Ves. 163.

³ Ex parte *Gibbons*, 1 Atk. 238.
Payne v. Spencer, 6 M. & S. 231.

⁴ Ex parte *Leigh*, 1 G. & J. 267.

⁵ 1 Atk. 238.

⁶ *Maude v. Jowett*, 3 East, 145.

Crumph v. Taylor, 1 Pri. 74. *Glen-
dinning v. Robinson*, 1 Taunt. 320.

⁷ 5 Geo. 2, c. 30, s. 6.

⁸ *Crumph v. Taylor*, supra.

⁹ *Shaw v. Cash*, 4 Bing. 80.

inconvenience of conveying the bankrupt down there from the King's Bench prison, *toties quoties*, for the purpose of examination before the commissioners, would be enormous, and the statute is not intended to take away all discretion from the court in this particular.¹

It does not seem that the *commissioners* have power to *discharge* a bankrupt, or a witness, who is improperly arrested whilst attending them; the practice being to apply either by motion, or petition, to the lord chancellor for a discharge—and, if necessary, for process against the officer for a contempt.² A person undertaking to indemnify the officer against conduct, which would amount to a contempt, will be considered equally guilty of the contempt himself.³ The application for the discharge of the bankrupt should be by *petition*, unless the arrest is under circumstances amounting to a *contempt*, in which case it should be by motion.⁴ The contempt, however, is only cognizable as such by the lord chancellor sitting in bankruptcy, and not by any other court; therefore, the court of King's Bench refused to discharge a person arrested whilst attending commissioners of bankrupt, as the contempt was considered to be not to that court.⁵

The proof or claim by a creditor of his debt, we have before seen, operates of itself as a discontinuance of any action previously brought against the bankrupt;⁶ and if the bankrupt is in custody at the time of such proof or claim, he is entitled to be immediately discharged, under the 59th section of the new act, without an application to the lord chancellor.⁷ Where also a creditor, who holds the bankrupt in arrest under mesne process, petitions to prove his debt, the bankrupt is entitled to his discharge *instantly*, upon the order for the proof.⁸ So where a creditor (previous to the commission) obtained a verdict against the bankrupt for a nominal sum, subject to a reference, and the award was made, and judgment entered up, for the debt and costs after the issuing of the commission—upon which the creditor proved his debt, and took the bankrupt in execution for the costs—the bankrupt was in this case ordered to be discharged.⁹

¹ *Offey v. Dickens*, 6 M. & S. 348.

² *Ex parte Kerney*, 1 Atk. 55.
Ex parte King, 7 Ves. 312.

³ *Ibid.* *Ex parte Dixon*, 8 Ves. 104.

⁴ *Anon.* 1 Rose, 230.

⁵ *Kinder v. Williams*, 4 T. R. 377.

⁶ See ante, p. 202.

⁷ But see *ex parte Cross*, 2 G. & J. 100.

⁸ *Ex parte Irving*, Buck, 423.

⁹ *Ex parte Haynes*, 1 G. & J. 107.

2. Of the Bankrupt's Right to Maintenance during his Examination.

By section 114 of the 6 Geo. 4, c. 16, the commissioners are empowered before the choice of assignees—and, after assignees are chosen, *they* are then authorized (with the approbation of the commissioners)—from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family.

The former statutes contained no provision to this effect,—though the *custom* was to make the bankrupt a reasonable allowance for his maintenance; for, as the bankrupt is bound to employ himself, previously to his examination, in making up his accounts and arranging his affairs for the benefit of his creditors, it seems but just that they should allow him sufficient to maintain himself and his family, whilst he is devoting his time to their service. But after the choice of assignees, the court will not make an order as to any allowance to the bankrupt for maintenance.¹ If the assignees, after granting an allowance for maintenance, withhold it, on the ground that the bankrupt's final examination has been adjourned *sine die*, the court of review has no power to interfere.²

But though the bankrupt is now entitled to such maintenance, as the commissioners or the assignees shall think proper to allow him, yet he will not be justified, and still less any third person, in taking any part of his effects and appropriating it for that purpose, without the consent of the commissioners or assignees. For where a sister-in-law of the bankrupt, at his request, took out of his house such a quantity of his plate as would raise 20*l.* for the maintenance of himself and family, and borrowed 20*l.* upon it, which was actually expended for that purpose—it was held that the assignees might recover the value of it in trover against the sister-in-law, though Lord Mansfield said it was a very cruel case; but if the assignees insisted on their claim, that the court could not relieve the defendant.³ The bankrupt, however, (as we have before seen,) may determine on the propriety of retaining such part of his wearing apparel as he thinks is *necessary* for his use; for he does this at the risk of being indicted for felony.⁴

¹ *Ex parte Hall*, 1 M. & A. 450.

² *Ibid.* 4 D. & C. 530.

³ *Thompson v. Councill*, 1 T. R.

⁴ *Ex parte Ross*, 1 Rose, 33. 17 Ves. 374.

3. Of the Bankrupt's Allowance under the Commission.

By 5 & 6 Vict. c. 122, s. 44, if the bankrupt obtains his certificate, and the net produce of his estate in hand pays 10*s.* in the pound, he is entitled to an allowance of five per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed 400*l.*¹

If his estate pays 12*s.* 6*d.* in the pound, he is entitled to an allowance of 7*l.* 10*s.* per cent., not exceeding 500*l.*

And if the estate pays 15*s.* in the pound or upwards, he is then entitled to an allowance of ten per cent., not exceeding 600*l.*

But the allowance is not payable until after the expiration of twelve months from the date of the fiat, and is only payable in the event of the dividends paid to the creditors, (who before the expiration of the twelve months shall have proved debts,) being of the requisite amount in that behalf. And if, at the expiration of that time, the dividends shall not amount to 10*s.* in the pound, the bankrupt can in that case only be allowed so much as the assignees and court shall think fit, not exceeding 3*l.* per cent., and 300*l.* in the whole.

Under the former statutes, it was held that the bankrupt was not entitled to his allowance until a *final* dividend was made; and the reason assigned was, that the 5 Geo. 2, c. 30, s. 7, only gave him an allowance, in case the net produce of his estate should be sufficient to pay the creditors 10*s.* in the pound "*over and above such allowance*;" and that, as any creditor might come in and prove his debt before a final dividend, it could not be ascertained till then, whether the bankrupt would be entitled to any allowance at all.² The clause in the 6 Geo. 4, c. 16, is somewhat differently worded from that of the 5 Geo. 2, for the words, "*over and above such allowance*," seem purposely omitted. It has been held, however, under the statute, that the allowance was not payable until a final dividend had been made.³

And now, as we have already seen, it is expressly declared by the 5 & 6 Vict. c. 122, s. 44, that the allowance is only payable, in the event of the *dividends paid* to the creditors

¹ These regulations are similar to those in the 5 Geo. 2, c. 30, ss. 7 & 8, except that the extent of the allowance is now made double the amount of what the bankrupt was before entitled to. The right to any al-

lowance was first given to the bankrupt by the 4 & 5 Ann. c. 17.

² Ex parte *Stiles and Pickart*, 1 Atk. 208.

³ Ex parte *Minchin*, Mont. & M. 135. Ex parte *Surridge*, *ibid.* 387.

being of the requisite amount; and therefore the bankrupt is not entitled to an allowance in respect of having paid 10s. in the pound, when his estate was only just sufficient to pay that sum.¹

Where a *final* dividend has been made, the allowance will be ordered to be paid, though there may be some property of small amount remaining to be realized.²

It has been said, if the bankrupt has once received his allowance, he is not bound afterwards to refund any part of it;³ but there may be some doubt as to the correctness of this position—for the lord chancellor has certainly the power to make the bankrupt refund; and it would depend most probably upon the peculiar circumstances of the case, whether the chancellor would interpose his authority or not.⁴

The above section, as we perceive, does not enable the bankrupt to demand his allowance until he obtains his certificate; that is, until it is confirmed by the lord chancellor;⁵ and it would, indeed, be of no service to him, if he could—for until he is entirely cleared by his certificate, every thing in his hands is liable to satisfy the claims of his creditors.⁶ And he must not only obtain his certificate before he can claim his allowance, but he must also obtain it before the dividends are made which entitle him to such allowance.⁷

When the bankrupt has obtained an *order of the commissioners* for his allowance, it becomes a vested interest in him, and is transmissible to his representatives;⁸ but, according to the words of the above section, the interest does not actually *vest* in the bankrupt until a dividend is *declared*.⁹ It is not necessary, however, that the bankrupt should be alive at the time of the declaration of the dividend,¹⁰ or that he should have actually obtained the commissioners' order for his allowance;¹¹ for where a bankrupt died before his estate paid 10s. in the pound, the vice-chancellor, after that dividend had been declared, ordered the assignees to pay the allowance to the bankrupt's personal representative.¹²

If the bankrupt's estate pays 20s. in the pound, and there are creditors whose debts carry *interest*, they are not entitled to such interest, in diminution of the bankrupt's allowance.¹³

¹ Ex parte *Petheridge*, 2 D. & C. 137.

² Ex parte *Davis*, 1 Mont. & M. 36.

³ *Russel v. Russel*, 1 Bro. 270.

⁴ See ex parte *Lanfear*, 1 Rose, 442.

⁵ Ex parte *Parry*, 2 G. & J. 858.

⁶ Ex parte *Grier*, 1 Atk. 207.

⁷ *Groome v. Potts*, 6 T. R. 548.

⁸ Ex parte *Trap*, 1 Atk. 208.

⁹ Ex parte *Safford*, 2 G. & J. 128.

¹⁰ *Ibid.*

¹¹ Ex parte *Calcot*, 1 Atk. 209.

¹² Ex parte *Safford*, *supra*.

¹³ Ex parte *Morris*, 1 Ves. jun.

132. 3 Bro. 79. *Bremley v. Goodere*, 1 Atk. 80.

Under a *second* commission the bankrupt is entitled to no allowance, unless his estate pays 1*s.* in the pound; for a certificate under a second commission only protects his person, unless every creditor receives a dividend to that amount; and his allowance, therefore, would in that predicament become the property of his creditors.¹

Partners are not entitled under a joint commission to a double allowance, that is, one in respect of the joint, and another in respect of the separate estate; but only one allowance is to be divided between them, in respect of both joint and separate effects; and this is to be calculated according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts—and the respective moieties of their joint estate—may have contributed to the payment of their joint debts.² Neither is a bankrupt under a joint commission entitled to any allowance, unless *both the joint and separate* creditors are paid 10*s.* in the pound.³ Notwithstanding, therefore, the *separate* estate of the bankrupt pays 20*s.* in the pound, he cannot claim any allowance before the *joint creditors* are paid with the surplus 10*s.* in the pound.⁴ And where a separate commission issued against one of several partners, under which the separate estate paid only 2*s.* in the pound, and the joint estate 18*s.*, the bankrupt was, in this case, held not entitled to any allowance.⁵ Under a joint commission, both the separate and joint estates contribute to the payment of the allowance.⁶

By 5 & 6 Vict. c. 122, s. 45, it is declared, that in all joint fiats, under which any partner shall have obtained his certificate—if a sufficient dividend shall have been paid upon the joint estate, and also upon the separate estate of such partner,—such partner shall be entitled to his allowance, although the other partner may not be entitled to any. Accordingly, where the estate of one of three partners had paid 20*s.* in the pound on his separate estate, and 12*s.* 6*d.* had been paid on the joint estate, it was held that he was entitled, for his own use, to an allowance of five per cent. not exceeding 400*l.*, although the estates of the two other partners had not paid a sufficient dividend.⁷ And a partner

¹ Ex parte *Gregg*, 6 Ves. 238.

² Ex parte *Bate*, 1 Bro. 453.

³ C. B. L. 523. Ex parte *Lomas*,

⁴ D. & C. 240.

⁵ Ex parte *Powell*, 1 Madd. 68.

⁶ Ex parte *Holmes*, 2 Rose, 95.

⁷ Ves. & B. 137.

⁸ Ex parte *Farlow*, 1 Rose, 421.

2 Ves. & B. 209. S. P. Ex parte *Terrell*, Buck, 345.

⁹ 1 Madd. 70. Mr. Christian, however, suggests that it should be paid only out of the joint effects.—2 Christ. B. L. 314.

¹⁰ Ex parte *Minchin*, Mont. & M. 135.

is entitled to an allowance, although his separate estate does not contribute to the joint estate, so as to make up the statutable amount for allowance under the joint estate. Thus where, under a joint commission against A., B., and C., C.'s separate estate paid 14*s.* 2*d.* in the pound, and the joint estate only 9*s.* 8*d.*, which was increased to 15*s.* by the surplus of the respective estates of A. and B., but C.'s estate contributed (having no surplus) nothing,—C. was, nevertheless, held to be entitled to his allowance.¹ But this expression in the act does not mean that the dividends paid upon each estate should be thrown together, and the average taken; but that the joint creditors and the separate creditors must have received respectively the full amount of dividends, before the proportionate allowance can be claimed.²

Where a sufficient dividend has been paid upon the joint estate, and also upon the separate estate of every one of the partners, each partner is entitled to a full allowance.³

The assignees are accountable for any money they distribute among the creditors without an order of dividend; and although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it, he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view of claiming his allowance; and the court will make a proper order, to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed.⁴

The bankrupt's right to his allowance cannot be prejudiced by an order to annul a separate fiat in favour of a joint fiat.⁵

There are, however, certain cases of misconduct on the part of the bankrupt, which will deprive him of all right to any allowance, and which equally bar him from obtaining his certificate. Thus, if he has lost by *gaming* ⁶ in one day 20*l.*—or 200*l.* within one year before his bankruptcy—or 200*l.* in one year by stock-jobbing;—or if he has destroyed or falsified any of his books or papers with intent to defraud his creditors—or has concealed property to the value of 10*l.*—or has been privy to a fictitious debt being proved;—he will in either of these cases forfeit all claim to any allowance.

¹ Ex parte *Morris*, Mont. 505.
² Dea. & C. 526.

⁴ Ex parte *Lomas*, 3 D. & C. 681.

³ Ex parte *Goodall*, 2 G. & J. 281.

⁵ Ex parte *Llewellyn*, 3 M. D. & D. 573.

⁶ Ex parte *Gibbs*, Mont. 105.

⁶ Section 130.

4. *Of the Bankrupt's Right to the Surplus.*

By 6 Geo. 4, c. 16, s. 132,¹ the assignees are required, upon request made to them by the bankrupt, to declare to him how they have disposed of his real and personal estate, and to pay the surplus, if any, to him or his personal representatives. And if the creditors, who have proved under the commission, shall be fully paid, the bankrupt will be entitled to recover the remainder of the debts due to him.

And by 5 & 6 Will. 4, c. 20, ss. 6 & 7, specific directions are given for the payment by the assignees into the Bank of England of any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided amongst the creditors, subject to the order of the lord chancellor, or the court of review. (And see ante, Chap. XII. Sect. 4, as to the disposal of unclaimed dividends.)

The expenses of working the commission are, of course, to be first refunded to the assignees out of the bankrupt's estate, before the surplus is restored to him.² And the assignees, also, are now restricted from paying such surplus, until *all* the creditors who have proved shall have received interest upon their debts, to be calculated at the rate, and in the order specified in the act; this provision differing from the former rule, which allowed interest to the creditors only when there was a *contract*, either expressed or implied, to pay it.³ And though creditors may have signed receipts *in full*, upon a payment of 20s. in the pound, under the idea that there would be no surplus, they are nevertheless still entitled to interest before the bankrupt can claim the surplus.⁴

A bankrupt pending a commission has a right to an inspection of the accounts of his assignees, in respect to his interest in the surplus; and the lord chancellor will, upon petition, rectify palpable errors pointed out by the bankrupt.

¹ This clause is substituted for the 5 Eliz. c. 13, s. 4. 1 Jac. 1, c. 15, s. 15.

² Ex parte *Dew*, cit. 2 Ves. jun. 301; and see *Bromley v. Goodere*, supra.

³ *Bromley v. Goodere*, 1 Atk. 75. Ex parte *Rooke*, ibid. 244. Ex parte *Champion*, 3 Bro. 436. Ex parte *Hankey*, ibid. 504. Ex parte *Mills*, 2 Ves. jun. 295. Ex parte

Cochs, 1 Rose, 317. 1 Ves. & B. 342. Ex parte *Williams*, ibid. 399. The justice of this recent alteration of the rule as to the allowance of interest, was long ago pointed out by Mr. Christian, vol. ii. 504, and by Sir William Evans in the 4th vol. of his edition of the Statutes, p. 3. Ev. B. L. 22, note 10.

⁴ Ex parte *Deey*, 1 Ball & B. 77.

But where the bankrupt has to a certain degree an intercourse with the estate during the commission, he will not afterwards, in the master's office, be permitted to surcharge and falsify accounts as to dividends paid, which have been settled by the commissioners in the administration of the bankruptcy.¹

If the bankrupt is dead, and there is real and personal estate more than sufficient to pay the debts with interest, the surplus real estate must be conveyed to his heir (if he died intestate), and his personal estate be divided amongst² his next of kin. But if he leaves a will, then the surplus of both estates will be subject to the dispositions contained in it, notwithstanding the will was made previous to his bankruptcy; for neither the bankruptcy, nor the bargain and sale by the commissioners, will operate as a revocation; the bankrupt law taking the property out of the bankrupt only, for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees become mere trustees for the bankrupt, and can be called upon to convey to him.³

Where part of a bankrupt's property consisted of real estate, *part* of which was *sold* by the assignees during his life—*another part contracted to be sold* at the time of his death—and the remainder was sold after his death;—it was determined in a question between his real and personal representatives, as to their rights to the surplus, that the heir at law had no claim in respect of the estate which was *sold*, or *contracted to be sold*, during the life of the bankrupt; for *that part* of the estate was to be considered as converted into personalty; but that as to such portion of the real estate as was *unsold*, and *uncontracted for* at the death of the bankrupt,—*that* was held to descend to the heir, subject to the charge created by the bankrupt law, for the payment of his debts. And the court said that it could make no difference in principle, whether such a charge were created by the provision of the law, or by the provision of the party; that, as far as the real estate was not exhausted by the charge, it was the property of the heir; that the bankrupt law had no purpose to alter the character of surplus property between the real and personal representatives of a bankrupt; and that, as to the charge for payment of debts created by bankruptcy upon the real estate of a deceased bankrupt, his

¹ *Two good v. Swanston*, 6 Ves. 485; and see 18 Ves. 81.

² *Bromley v. Goodere*, 1 Atk. 81.

³ *Charman v. Charman*, 14 Ves. 580.

personal estate is to be considered as first applicable; and that the heir was entitled in the first place to be indemnified out of the surplus, to the extent in which it should ultimately appear, that the real estate was not required for the payment of debts.¹

Where a man is a partner in two separate firms, each of which becomes bankrupt, the surplus of his separate estate must be applied in discharging the joint debts of the two firms, in proportion to the whole amount of the debts proved against each firm² respectively. And, generally, in cases of partnership, the bankrupt's right to the surplus will depend, as to the amount, upon the result of the account between the partners.³ Thus, where the bankrupt had, under a separate commission, obtained an order for payment of the surplus to him, which was accordingly paid,—it was determined, that his partner was entitled to apply by petition in the bankruptcy for an account of such surplus, and for payment of his proportion of it; and that the court had jurisdiction to make an order to that effect.⁴

5. As to the Right of an uncertificated Bankrupt to acquire and retain Property.

A bankrupt is not actually divested of his property until the commissioners' assignment.⁵ And, although property subsequently acquired by the bankrupt before he obtains his certificate, is liable to be taken from him by his assignees, if they choose to claim it—all such property, in fact, passing to them by the assignment of the commissioners,—yet it does not *absolutely* vest in them; and if *they* make no claim to it, the bankrupt has a right to such property, as against all *other* persons.⁶ Thus, where an uncertificated bankrupt assigned after-acquired property, in trust, for a valuable consideration—and a creditor of the bankrupt seized it in execution,—it was held that the trustee might recover it in trover from the creditor.⁷

¹ *Banks v. Scott*, 5 Madd. 493.

² *Ex parte Franklyn*, Buck, 332. *Ex parte Bruce*, Whitm. B. L. 353. *Ex parte Barron*, *ibid.* 354.

³ *Ibid.*; and see *ex parte Lanfear*, 1 Rose, 442. *Ex parte King*, 17 Ves. 115. *Ex parte Taylor*, Rose, 175.

⁴ *Ex parte Lanfear*, *supra*.

⁵ 2 Co. Rep. 26 a.

⁶ *Drayton v. Dale*, 2 B. & C. 293. 2 Dow. & R. 534; and see *post*, title "Actions."

⁷ *Laroche v. Wilkinson*, Peake, 140.

Lord Kenyon, indeed, has upon more than one occasion¹ expressed an opinion, that the rights of the assignees do not extend to property, which the bankrupt acquires "as the fruits of *his personal labour*;" but there seems to be no sound reason for this distinction at law; for, though the assignees (as Lord Mansfield said)² cannot let out the bankrupt for profit, or contract for his labour,—yet when he has *realized property*, notwithstanding it may be the produce of his labour, or the fruits of his knowledge or his skill, and it would be in many cases cruel and unjust in the assignees to deprive him of it,—still, it is apprehended, (according to the principle of the bankrupt law,) they would have a strict right to claim it—as in the case (which has been before noticed)³ of a patent for an invention obtained by him before his certificate. For every species of *property* acquired by a bankrupt before his certificate (no matter how obtained) is a sort of defeasible property, which his assignees—though none but his assignees—are able to defeat.⁴

Therefore, where an uncertificated bankrupt, who followed the business of a furniture broker, was employed by the defendant to remove his goods, in the course of which business he employed several men and vans, supplied packing cases, repaired furniture, and provided materials for this purpose, and other articles to a trifling amount; it was held that the debt which thereby accrued to the bankrupt was claimable by the assignees. But this case seems to have been decided on the ground that the debt was not the mere result of the *bankrupt's personal labour*.⁵

In this case, too, it was held that the assignees might interpose after action brought; and that a payment to them before declaration (where the proceedings were by bill) might be given in evidence under the general issue; and that if the payment had happened after declaration, it would be good matter for a special plea.⁶

Creditors of a bankrupt, therefore, who are not assignees, have no property in goods acquired by him after his bankruptcy;—if they take them, they are trespassers—if they are stolen from the bankrupt, they may be alleged (in an indictment for the felony) to be *his property*—if he sells them, he may receive the money for them—and if he pawns them, he

¹ *Evans v. Brown*, 1 Esp. 70.
² *Webb v. Ward*, 7 T. R. 296.

³ *Chippendale v. Tomlinson*, 1 C. B. L. 431.

⁴ *Hesse v. Stevenson*, 1 B. & P. 565; ante.

⁵ *Fowler v. Down*, 1 Bos. & P. 44, per Heath, J.

⁶ *Crofton v. Poole*, 1 B. & Adol. 568.

⁷ Ibid.

may redeem them, on tendering the money for which they were pledged.¹

And where an uncertificated bankrupt carried on the business of a publican, and got brewers to advance him money to take the lease of a public-house, which he agreed should be deposited with the brewers directly it was executed, as a security for the advance; and the lease was accordingly delivered to them, accompanied with a memorandum signed by the bankrupt, stating the purpose of the deposit, and agreeing to execute a legal mortgage by way of under-lease when required; it was held that the brewers had a good lien on the lease against the assignees.²

SECTION VII.

Of Actions at Law, and other Proceedings, by and against an uncertificated Bankrupt.

(And see post, "*Certificate*," "*Supersedas*.")

Notwithstanding a man is declared a bankrupt under a commission issued against him, and his estate and effects are assigned to assignees, yet he is not *bound* by the adjudication of the commissioners; and if he be really not liable to a commission of bankruptcy, or is improperly adjudged one, he may maintain an action of trespass against his assignees.³ But by the 5 & 6 Vict. c. 122, s. 24, if the bankrupt shall not (if within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe) within three months after such advertisement, or (if elsewhere) within twelve months, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, and shall not have prosecuted the same with due diligence, and with effect, the *Gazette* containing the advertisement is declared to be conclusive in all cases as against him, and in all actions or suits brought by the assignees for any debt or demand for which the bankrupt might have sued, that he became a bankrupt before the date and suing forth of the fiat, and that the fiat was sued forth on the day stated in the *Gazette*.⁴ And where a bankrupt was

¹ *Webb v. Fox*, 7 T. R. 391, per Grose, J.; and see post, "*Actions*."

² *Meux v. Smith*, 2 M. D. & D. 789. 1 M. D. & D. 396.

³ *Perkin v. Proctor*, 2 Wils. 382; and see ante, Ch. v. s. 6.

⁴ See, as to the construction of this section, ex parte *Thorold*, 3 M. D. & D. 285.

required by his assignees, on his last examination, to deliver to them his books of account, which he did—and it was afterwards found that he was not a trader, and that the commission had improperly issued,—it was held that he might support an action of trover for the books against the assignees.¹ But a bankrupt cannot hold his assignees to bail in an action to try the validity of the commission.² But when such an action is brought for some alleged *irregularity* in the proceedings, or without any great merits on the part of the bankrupt, the lord chancellor will not make an order for the bankrupt to inspect the proceedings, to enable him to find out the infirmities of the commission, if any should exist.³

In an action by the bankrupt for maliciously suing out a fiat, the adjudication of the commissioner does not in itself negative the want of probable cause. And where, in such an action, the plaintiff proved that the commission was superseded, and that an action of trespass was brought by him against the defendant for the seizure of the goods, in which the defendant pleaded the bankruptcy, and there was a verdict for the plaintiff; and it was also proved that, shortly before the commission was taken out, the plaintiff had removed some goods, under circumstances which did not make the removal an act of bankruptcy, but were probably relied on by the defendant as having that effect; it was held that this was enough to throw on the defendant the onus of proving probable cause for suing out the commission.⁴

In every action of this nature, it must be averred and proved that the fiat was superseded; and if this fact is not proved, the plaintiff will be non-suited, although it is not averred in the declaration, and although the defendant has omitted to demur for the omission.⁵

Where a bankrupt brought an action to try the validity of the commission, in which a verdict was found against him, and he swore that he was taken by surprise at the trial, and that he could not proceed to a new trial, without paying double costs of the former action, which he was wholly unable to pay; the court directed an issue, and that the former verdict should not be set up as an objection.⁶

If a bankrupt, also, has done any act amounting to an

¹ *Summersett v. Jarvis*, 6 Moore, 56. 3 B. & B. 2.

² *Chambers v. Bernasconi*, 6 Bing. 499.

³ *Ex parte Vaughan*, 14 Ves. 513.

⁴ *Cotton v. James*, 1 B. & Adol. 128.

⁵ *Whitworth v. Hall*, 2 B. & Ad. 695.

⁶ *Ex parte Eager*, Mont. 85.

acquiescence in the commission, he is then estopped from suing his assignees. Therefore where he goes to the different creditors, to solicit them to vote for particular persons as assignees;¹ or where he takes a part in the sale of his own effects under the commission;² or obtains his discharge out of custody in an action by a judge's order, on the ground of his bankruptcy;³ or after long acquiescence;⁴—he will not, in either of these cases, be allowed afterwards to question the commission in an action against his assignees. So, where in an action by the bankrupt against the petitioning creditor to try the validity of the commission, it was proved that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts—and that the bankrupt *objected to part* of the petitioning creditor's account, whereupon the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.*;—this was held to be evidence (to be left to the jury) of an implied admission by the bankrupt, from his conduct and demeanor before the commissioners, that such a balance was due.⁵ So, a bankrupt will be restrained from bringing an action against his assignees, after lying by for a long period, or after repeated acts of acquiescence, and the dismissal of a petition to annul the fiat.⁶ Therefore, where, after a petition presented by a bankrupt for a *supersedeas*, he abandoned the petition, and joined in a conveyance of part of his property, and solicited and procured also the requisite signatures to his certificate,—he was restrained from proceeding in an action (against the messenger) to impeach the commission.⁷ And where, at the instigation of the petitioning creditor and another creditor, a bankrupt brought an ejectment to recover the possession of premises sold under a commission (under which he had acquiesced for seven years),—an injunction was granted, on the petition of the assignees, to restrain him from proceeding in it.⁸ And, under very slight circumstances of acquiescence, where the bankrupt has lain by for a period of twenty years, the court will grant an injunction to restrain the bankrupt from bringing an action against a

¹ *Like v. Howe*, 6 Esp. 20.

² *Clarke v. Clarke*, *ibid.* 61.

³ *Goldie v. Gunston*, 4 Camp. 381. *Watson v. Wace*, 2 Carr. P. 171. 5 B. & C. 53. *Ex parte Leigh*, 2 G. & J. 532.

⁴ *Ex parte Hornby*, M. & B. 1.

⁵ *Jarrett v. Leonard*, 2 M. & S. 265.

⁶ 18 Ves. 393. *Ex parte White*, 4 D. & C. 279.

⁷ *Ex parte Cullen*, 1 G. & J. 317.

⁸ *Ex parte Grant*, Buck, 90.

purchaser under the fiat.¹ Where a bankrupt had assisted his assignees, by giving directions as to the sale of the goods, and, after the issuing of the commission, gave notice to the lessors of a farm which he held, that he had become bankrupt, and that he was willing to give it up, and the lessors in consequence *took* possession of the premises:—held, that this interference of the bankrupt in the sale of his goods was referable to an intention on his part to take care of the property, and see that the most was made of it; and that it did not amount to an assent to the sale. And that he was not estopped by the act of his having given up his lease to his lessors, the assignees not being parties or privies to that transaction.² So the fact of the bankrupt having agreed with his assignees to purchase his estates, is not an act amounting to an acquiescence in the validity of the fiat.³ But the mere *surrender* by the bankrupt to the commission, or having applied for his protection, is not an estoppel to his right to dispute it at law; even though he presents a petition to enlarge the time for his surrender, in which he states that he has been *duly declared* a bankrupt.⁴ Neither is a bankrupt estopped from controverting the validity of the commission in an action against a *stranger*, notwithstanding he has even obtained his certificate under it; for, in order to create an estoppel, there must be reciprocity between the parties; and a stranger can neither take advantage of, nor be bound by, an estoppel.⁵ But where an uncertificated bankrupt sued a stranger to the commission for the amount of a demand which had accrued since the bankruptcy, and it was proved that the bankrupt had attended the commissioners, passed his accounts, and afterwards used endeavours to get his certificate signed; this,—with the commission, adjudication, and assignment,—was held sufficient evidence of the bankruptcy.⁶ And even in such an action against his assignees, an injunction will not be granted by the court of Chancery to restrain him from proceeding in it, merely on the ground that he has obtained his certificate, without alleging also that the commission was valid, and that the action was brought with a view only to harass the assignees.⁷

¹ Ex parte *Davy*, 4 D. & C. 322.

² *Heane v. Rogers*, 9 B. & C. 577.

³ Ex parte *Hill*, Mont. 9.

⁴ *Mercer v. Wise*, 3 Esp. 216.

⁵ *Butts v. Bilke*, 4 Pri. 240.

⁷ East, 352 b.

⁶ *Crofton v. Pcole*, 1 B. & Adol. 568.

⁷ *Kirkpatrick v. Dennet*, 1 Sim. & S. 408. 1 G. & J. 300.

Where one of a bankrupt's assignees had received money as a trustee, under a trust-deed prior to the commission, which he had not accounted for, and the bankrupt showed that there would be a clear surplus of his effects, he was allowed on petition to sue him in the name of the other assignee, and he was restrained from setting up his character of assignee to defeat the action.¹

And where a bankrupt disputed the validity of a commission, on the ground of the insufficiency of the petitioning creditor's debt, and applied to the commissioner to appoint an official assignee to investigate the insufficiency of the debt, and take care of the property; it was held that the bankrupt was not precluded from suing the official assignee.²

A bankrupt, however, will not be permitted to try the validity of his commission, by actions against the debtors to his estate. Therefore, where a bankrupt, who insisted that his commission was invalid, gave one of his debtors notice not to pay his assignees, and brought an action for the recovery of the debt,—and the assignees also threatened to do the same,—a bill of interpleader by the debtor was entertained; and upon the usual affidavit, and payment of money into court, an injunction was granted.³ And although the assignees reject a debt, it cannot be sued for by the bankrupt.⁴

As a bankrupt, though uncertificated, can acquire and hold property against every one except his assignees, so he can maintain an action of *assumpsit* against a third person for his own work and labour performed since the issuing of the commission, and for materials furnished necessary to his labour.⁵ And where no claim is made by the assignees, he may also maintain *trover* for goods acquired after his bankruptcy,⁶ and even *assumpsit* for goods sold,⁷ or for money lent and advanced by him after his bankruptcy;⁸ as well as trespass *quare clausum fregit*, for a trespass⁹ committed before his bankruptcy; for the defendant in any of these actions cannot object to the bankrupt's claim,

¹ Ex parte Archer, 2 G. & J. 110.

² Munk v. Clark, 2 Bing. N. C. 299. 2 Scott, 475.

³ Lowndes v. Cornford, 1 Rose, 180. 18 Ves. 299. Harlow v. Crowley, in Exchequer, Buck, 273, contra.

⁴ Hilary v. Morris, 5 C. & P. 6.

⁵ Chippendale v. Tomlinson, 1 C.

B. L. 431. Silk v. Osborne, 2 Esp. 140.

⁶ Fowler v. Down, 1 Bos. & P. 44. Laroche v. Wakeman, Peake, 140. Webb v. Ward, 7 T. R. 296.

⁷ Webb v. Fox, 7 T. R. 391.

⁸ Hayllar v. Sherwood, 2 Nev. & M. 401.

⁹ Evans v. Brown, 1 Esp. 170.

⁹ Clarke v. Calvert, 3 Moore, 96. 8 Taunt. 742.

unless his assignees interpose—and the bankrupt may, in fact, sue as a trustee for the assignees.¹

And where judgment had been entered up and execution issued on a warrant of attorney against a bankrupt before the issuing of the fiat, it was held that he was not therefore disqualified, by want of interest, from moving to set aside the execution on the ground of bad faith, though the debt, warrant, and judgment are unimpeached.²

So he may present a petition against the solicitor for the petitioning creditor, on his personal undertaking to pay the bankrupt his costs of a petition for a *supersedeas*, where the assignees disclaim all interest in the matter.³

But where the bankrupt sued out a *latitat*, and the defendant *before declaration* paid the debt to the assignees; it was held, that the action being by bill, this payment might be given in evidence under the general issue.⁴

If in an action by the executor of a bankrupt for the recovery of a debt, the defendant give in evidence the commission, and a receipt by the assignees for the debt, such evidence is sufficient to discharge the defendant; but if, instead of relying upon it, he attempts to prove the validity of the commission, and fails, that is not sufficient.⁵

But an uncertificated bankrupt cannot bring trespass against a defendant for seizing his furniture, who acted by *authority* of the *assignees*, notwithstanding the assignees had agreed with a friend of the bankrupt, for a valuable consideration, to leave such furniture in the bankrupt's possession;—for an uncertificated bankrupt is not entitled to retain any property *against* his assignees.⁶ So, where an uncertificated bankrupt sued a creditor (who had become such since his bankruptcy) for seizing his effects subsequently acquired,—and the creditor, after a rule to plead, obtained a surrender of the interest of the assignees in the effects seized;—it was held that this was a ratification of the seizure by the assignees, and that the bankrupt could not recover.⁷ And where a bankrupt, before obtaining his certificate, brought an action upon a promissory note, and for money lent,—a plea that the plaintiff was an uncertificated bankrupt, and that his assignees “required the

¹ *Cumming v. Roebuck*, 1 Holt, 172. *Clarke v. Calvert*, *supra*.
Davies v. Penton, 6 B. & C. 216.

² *Pinches v. Harvey*, 1 Ad. & Ell. N. S. 868.

³ *Ex parte Bentley*, 2 D. & C. 578.

⁴ *Crofton v. Poole*, 1 B. & Adol. 568.

⁵ *Smith v. Evans*, 2 Moore, 474.

⁶ *Nias v. Adamson*, 3 B. & A. 225.

⁷ *Hull v. Pickersgill*, 1 B. & B. 282. 3 Moore, 612.

defendant to pay to them" the money claimed by the plaintiff, was held good;—and a replication, that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit, and that the commissioners had made no new assignment of the said note and money, was held bad—upon the established principle, that the general assignment of the commissioners passes to the assignees all his after-acquired, as well as present, property and debts.¹

And although an uncertificated bankrupt can maintain an action of *assumpsit*, if his assignees do not interfere, yet he cannot support such action, if he has been twice a bankrupt, and he has not paid 15s. in the pound under the second fiat, whether he has obtained his certificate or not; for in such case all his property is absolutely vested in his assignees under the second fiat.²

Where the assignees employ the bankrupt in carrying on his trade or manufacture for the benefit of the estate, and pay him money from time to time, it is evidence of such a contract between him and the assignees, as will enable him to recover from them a reasonable compensation for his work and labour.³

In a case where the creditors of a bankrupt entered into a deed of composition to receive 8s. in the pound, in *full discharge* of their debts, and agreed to release every thing beyond that to the bankrupt, and join in a petition to the chancellor to supersede the commission—and one of the creditors, having two distinct debts due from the bankrupt (for one of which he held bills for the full amount), received his dividend of 8s. in the pound on both debts, and then recovered the full value of some of the bills;—it was held that the bankrupt, under these circumstances, was entitled to recover the money so obtained on the bills, in an action for money had and received.⁴

As a debt due to a bankrupt, *as trustee* for another, does not pass under the commissioners' assignment,—it has been held that a bankrupt, who previous to his bankruptcy assigned a debt then owing to him, (and who became, therefore, in the nature of a trustee for the person to whom the debt was assigned,) might sue the debtor in his own name for the benefit of the assignee of the debt.⁵

¹ *Kitchen v. Bartsch*, 7 East, 53.

⁴ *Stock v. Mawson*, 1 B. & P.

² *Young v. Rishworth*, 3 Nev. 286.

& P. 585. 8 Ad. & E. 470.

⁵ *Winch v. Keeley*, 1 T. R. 619.

³ *Coles v. Barrow*, 4 Taunt. 754.

And where a bankrupt was the holder of a bond and a warrant of attorney, and after his bankruptcy and certificate, entered up judgment on the warrant of attorney; it was held that the judgment was properly entered, but that the bankrupt must be considered as a trustee for his creditors.¹

A plea of the plaintiff's bankruptcy must state the trading and all the particulars necessary to lead to the issuing of a fiat, and aver positively that the party *was* a bankrupt; and where a plea only alleged the commission under which the party was duly found and adjudged a bankrupt, it was held insufficient.²

In order to prove the averments of such plea on the trial, the adjudication of bankruptcy, with the assignment, and proof that the plaintiff passed his examination, and endeavoured to obtain his certificate, is sufficient evidence of the bankruptcy.³

If one of two defendants plead bankruptcy, *pais darreen continuance*, the plaintiff cannot at *nisi prius* confess this plea to be true, and go on as to the other defendant.⁴

A bankrupt is personally liable for the *costs* of an action commenced by him, and proceeded in by the assignees in his name, notwithstanding he has obtained his certificate. And, though the court of Chancery will protect him from such costs, when he acts fairly,—yet where he induces the assignees to pursue the action by misrepresentation, he will not be relieved.⁵ Where he sues as trustee for his assignees, and for their benefit, and not for the fruits of his own personal labour, he has been required to give security for costs.⁶ And the court of Common Pleas, upon one occasion of this kind, refused to grant a new trial, unless the assignees would abide by the verdict, and become responsible for the costs.⁷ So, where an uncertificated bankrupt (after being nonsuited in an action of trespass for false imprisonment in the court of King's Bench, on the ground of not being prepared with evidence to prove the validity of a former commission,) brought a fresh action in the Common Pleas,—the last-mentioned court ordered the proceedings to be stayed, until he paid the costs of the former action; as he ought to have been prepared with such evidence on the

¹ *Guinness v. Carroll*, 1 B. & Ad. 459.

² *Guinness v. Carroll*, 2 Man. & Ry. 132.

³ *Crofton v. Poole*, 1 B. & Ad. 568.

⁴ *Pascall v. Horseley*, 3 C. & P. 372.

⁵ *Ex parte Seaman*, 1 G. & J. 260.

⁶ *Webb v. Ward*, 7 T. R. 296.

⁷ *Noble v. Adams*, 7 Taunt. 59.

first trial.¹ But in another case, where a joint action was brought by two persons, one of whom was a bankrupt, and the other a prisoner in Newgate, the same court refused to require such security; though the judgment of the court, in this case, seems to proceed upon the consideration of the circumstance of the imprisonment of one of the plaintiffs,² and not of the bankruptcy of the other.

Where an action is brought against a bankrupt for the same debt, which a creditor has proved under the commission, the proof cannot be *pleaded in bar*—but the bankrupt may either apply to the lord chancellor to expunge the debt, or move the court in which the action is brought to stay proceedings.³ In *assumpsit* against two defendants, where one pleaded *non assumpsit* and bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, as to the several matters pleaded by him—and the other defendant pleaded *non assumpsit*;—the latter was held not discharged by the *nolle prosequi*.⁴ In such case the defendant against whom the *nolle prosequi* is entered, is not entitled to costs under the 8 Eliz. c. 2, even though the plaintiff was apprised of the bankruptcy.⁵

Where, in an action against a bankrupt by his lessor on his covenants in a lease, he relies on the 75th section of 6 Geo. 4, c. 16, as a defence, he must plead specially facts to bring him within the section.⁶

By 5 & 6 Vict. c. 122, s. 36, the court authorized to act in the prosecution of the fiat may, upon the request in writing of three creditors (not being partners), who have proved debts of the amount of 50*l.*, direct the assignees, if the bankrupt shall be suspected of or charged with the commission of any offence specified in that act, to prosecute the bankrupt for such offence, and to order the costs and expenses to be paid out of the estate. If the assignees refuse or neglect to prosecute, having no lawful or reasonable impediment allowed by such court, the court may then order the prosecution to be carried on by the official assignee, or by the creditors making such request.

Where, in an action against a bankrupt, he pleaded that after the debt was contracted a fiat was issued against him,

¹ *Crawley v. Impey*, 8 Taunt. 407. ² *Moore*, 460.

³ *Anon.* 2 Taunt. 61.

⁴ *Harley v. Greenwood*, 5 B. & A. 95; and see ante, "Election."

⁵ *Moravia v. Hunter*, 2 M. & S.

444. *Noke v. Ingham*, 1 Wils. 89.

⁶ *Booth v. Middlecoat*, 6 Bing.

445. 4 M. & P. 182.

⁷ *Hope v. Booth*, 1 B. & Ad. 508, per Parke, J.

on the petition of the plaintiff, that before he was adjudged bankrupt an agreement was made between him and the plaintiff, under which the plaintiff abandoned all proceedings, in consideration of the defendant giving him a bill of exchange as a security for part of his debt; it was held, on special demurrer, that the plea did not show the debt to be forfeited, within 6 Geo. 4, c. 16, s. 8, as there was no averment that the plaintiff had, or could have, received by the agreement more than the other creditors, or that the defendant had not assets to pay all his creditors their demands in full, or that the fiat had been proceeded with.¹

On an indictment against a bankrupt for concealing his effects, the *venue* may be laid in any county, where the prosecutor can prove an actual concealment.² And, on the trial of such an indictment, a book delivered up at his last examination with other papers, on his signing a declaration that *they* contained a full and true disclosure and discovery of all his estate and effects, was held necessary to be produced as part of the prosecutor's case.³ An indictment for perjury in an affidavit in bankruptcy may be sustained, although the affidavit cannot, by the practice of the office, be used for defect in the jurat; the perjury being complete at the time the affidavit is sworn.⁴ Where, upon an indictment of a bankrupt for perjury (alleged to have been committed in an affidavit sworn before a commissioner of the court of Chancery), it was alleged that the defendant preferred his petition to the lord chancellor, setting forth various matters, and stating that "at the several meetings before the *commission*," the defendant declared openly to a certain effect—and upon the trial, it appeared that the statement of the petition was, that "at the several meetings before the *commissioners*," the defendant declared to that effect;—it was held that this was no variance, inasmuch as it was sufficient to set out in the indictment the petition in substance and effect; and that the word "*commission*" also was one of equivocal meaning, being used to denote, either the *trust or authority* exercised, or the *person* by whom it is exercised; and that on this occasion it sufficiently appeared, from the context of the petition as set forth in the indictment, that it was used only in the latter sense.⁵ But where

¹ *Davis v. Holding*, 11 Ad. & E. 710. 3 Per. & D. 413.

² *Rex v. Evans*, 1 Ry. & M. 70.

³ *Ibid.*

⁴ *R. v. Hailey*, 1 Ry. & M. 96.

⁵ *Rex v. Dudman*, 4 B. & C. 850. Another objection taken at the trial was, that the affidavit was sworn before the petition was presented, and consequently that there

an indictment against a bankrupt for not making a full disclosure of his estate, averred that a notice required him to surrender pursuant to the 5 Geo. 2, c. 30, and it appeared that the title to the 49 Geo. 3, c. 121, was substituted for that of the 5 Geo. 2, in the notice, the variance was held fatal.¹

SECTION VIII.

Of Suits in Equity by and against an uncertificated Bankrupt.

Though an uncertificated bankrupt cannot, generally speaking, file a bill in equity;² yet where he has a clear interest, and the assignees refuse to sue, the lord chancellor will, upon petition, compel them (upon an offer of indemnity) to let him use their names;³ for his disability in general cases to sue is not to be acted upon, to the effect of gross injustice.⁴

But, where a bankrupt filed a bill against a mortgagee of estates in England and Barbice, for an account and payment of the balance to his assignees—and he made his assignees defendants, charging collusion between them and the other defendants, but did not aver that there would be a surplus, nor charge a direct application to his assignees to sue;—a demurrer was allowed for want of such allegations.⁵ And, where a bill was filed by a bankrupt, who had taken the benefit of the Insolvent Debtors' Act, and his assignees under that act, against the assignees under his commission and others, stating improper conduct and collusion, and that all or most of the creditors under the commission were satisfied, and praying an account,—a demurrer in this case was also allowed, on the ground that the proper mode of proceeding was by *petition* in bankruptcy.⁶

was then no judicial proceeding pending; and the court inclined in favour of the objection, though they gave no judgment upon it. *R. v. Dudman*, 2 G. & J. 389.

¹ *Rex v. Burraston*, 1 Gow, 210.

² *Hammond v. Attwood*, 3 Mad. 158; and see *Bowser v. Hughes*, 1 Anst. 101.

³ *Spragg v. Binkes*, 5 Ves. 587.

⁴ Per Lord Eldon, *Benfield v. Solomons*, 9 Ves. 77. The practice,

however, is stated somewhat differently in Lord Redesdale's *Treatise on Pleading*, where it is laid down, that a bankrupt may sue in equity, if he disputes the validity of the commission, provided he brings the assignees before the court by supplemental bill.—*Mitford on Pleading*, 52.

⁵ *Benfield v. Solomons*, 9 Ves. 77.

⁶ *Saxton v. Davis*, 1 Rose, 79. 18 Ves. 72.

So, where a bankrupt filed a bill against a debtor to his estate, asserting the invalidity of the commission, and charging collusion between his assignees and the debtor—a demurrer was likewise allowed, the proper course being, either to try in an action the validity of the commission, or to petition to remove the assignees.¹

Where a bill, however, was filed by an uncertificated bankrupt in the Exchequer—though the assignees were not before the court—yet, it being admitted that the assignees had already failed in an ejectment brought by them to recover the premises in question, by not being able to prove the petitioning creditor's death,—the court retained the bill, until proper parties should be added (if necessary), the plaintiff paying the costs of the day.² And where a bankrupt filed a bill against a creditor (who was prosecuting an action at law against him) without making his assignees parties to the suit, and stated in his bill, that if the accounts were taken between him and the creditors, a balance would be found due to him; and the bill also prayed a discovery as well as an account, and payment of the balance with the usual submission, and also an injunction and general relief;—a plea of bankruptcy was overruled by the vice-chancellor, though he thought the bill went too far, to pray that the balance of the account might be paid to the plaintiff;³ and this decision was afterwards affirmed upon appeal.⁴

The court will not, under any circumstances, order a bankrupt who presents a petition to give security for costs;⁵ nor will the court give costs against him, on his petition to annul the fiat,⁶ unless it is prosecuted vexatiously, and he is evidently aware of having committed an act of bankruptcy.⁷ And a bankrupt who has obtained his certificate loses his privilege as to costs.⁸

On the hearing of a petition to reverse the adjudication, the bankrupt is entitled to have copies of the depositions, to enable him fairly to dispute the bankruptcy.⁹

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that

¹ *Hammond v. Attwood*, 3 Mad. 158.

² *Govett v. Armitage*, 2 Anstr. 412.

³ *Lowndes v. Taylor*, 2 Rose, 365. 1 Mad. 435. •

⁴ 2 Rose, 432.

⁵ *Ex parte Munk*, 2 D. & C. 120.

⁶ *Ex parte Heath*, M. & Bl. 116.

⁷ *Ex parte Thompson*, 4 D. & C. 534.

⁸ *Ex parte Lomas*, 4 D. & C. 258.

⁹ *Ex parte Jackson*, 2 D. & C. 601. *Ex parte Smith*, 3 D. & C. 101.

his estate will produce a surplus, after paying 20s. in the pound.¹

A bankrupt will be permitted to prosecute a petition, impeaching the debt on which the commission issued, *in formâ pauperis* (provided a proper case is shown), upon a certificate of counsel, that the petitioner had just cause to be relieved, and an affidavit that he was not worth 5*l*.²

Upon the same principle, also, as that which incapacitates a bankrupt from being a *plaintiff* in a suit, he is in general protected from being sued in equity as a *defendant*. Thus, where a bankrupt had mortgaged a copyhold estate, but no bargain and sale was made to his assignees, and the mortgagee filed a bill against the bankrupt and his assignees to redeem,—a demurrer by the bankrupt was allowed, as he was not a *necessary* party to the bill.³

So, the bankrupt cannot be joined as a *defendant*, in a suit against his assignees for the purpose of *relief*.⁴ But it seems, if any *discovery* is sought of his acts *before* he became bankrupt, he may be compelled to answer to that part of the bill, for the sake of discovery, and to assist the plaintiff in obtaining proof; though, at the same time, his answer cannot be read against his assignees.⁵ Therefore, where a bill was filed against a bankrupt and his assignees, charging a fraudulent bankruptcy, for the purpose of defeating the plaintiff's execution, as well as other circumstances of fraud, and praying a discovery and injunction,—a demurrer by the bankrupt was overruled.⁶

¹ *Ex parte Ryley*, 4 D. & C. 50.

Bailey v. Vincent, 5 Mad. 48.

² *Ex parte Northam*, 2 Ves. & B. 124.

18 Ves. 72.

³ *Lloyd v. Lander*, 5 Mad. 282.

⁵ *Mitford on Pleading*, 142; and see *Glassford v. Jeffery*, cit. 1 Ves. & B. 549.

⁴ *Griffin v. Archer*, 2 Anst. 478.

cit. 2 Ves. jun. 643. *Whitworth v. Davis*, 1 V. & B. 545; and see

⁶ *King v. Martin*, 2 Ves. jun. 641; and see post, Chap. xviii. s. 1.

CHAPTER XIV.

OF THE CERTIFICATE.

SECT. 1. *Of the Allowance by the Commissioner.*

2. *Of the Confirmation by the Court of Review, and herein of opposing such Confirmation; the Allowance, and recalling the Certificate after being so confirmed.*

3. *When the Certificate is Void.*

4. *Effect of the Certificate.*

5. *Of Pleading the Certificate; and herein of the Evidence to support it, or defeat it.*

6. *Of Discharging a certificated Bankrupt.*

7. *Of the Bankrupt's Liability on a new Promise.*

(*For the Practice on Petitions to stay the Certificate, see post, "Practice on Petition."*)

SECTION I.

Of the Allowance by the Commissioner.

The mode of obtaining the bankrupt's certificate¹ is materially altered by the 5 & 6 Vict. c. 122, it no longer requiring the signatures of his creditors, and the commissioner having now power either to allow it unconditionally, or to suspend the allowance, or to annex such conditions to the allowance of it as he may think proper, subject, however, to the confirmation of such allowance by the court of review. The new mode of proceeding is thus specified by the 39th section of the above statute. The court authorized to act in

¹ The 4 & 5 Ann. c. 17, s. 19, was the first statute that gave to the bankrupt the benefit of a certificate of conformity; by which act the power of granting it was vested in the commissioners alone. The 5 Ann. c. 22, afterwards required the consent of the creditors. The 5

Geo. 1, c. 24, s. 16, incorporated both these requisites, which were subsequently included in the 5 Geo. 2, c. 30, s. 10, and the 6 Geo. 4, c. 16. The power of the commissioners given by the statute of Anne is now revived by the statute 5 & 6 Vict. c. 122.

the prosecution of the fiat may, on the application of the bankrupt, appoint a public sitting for the allowance of his certificate, of which twenty-one days' notice must be given in the *London Gazette*, and to the solicitor of the assignees. At this sitting any of the bankrupt's creditors may be heard against such allowance; but it is expressly declared that it shall not be requisite for the certificate to be signed by any of the creditors. The court is to have regard to the conformity of the bankrupt to the bankrupt laws, and to his conduct as a trader before as well as after his bankruptcy, and to judge of any objection against allowing the certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance, or annex such conditions thereto as the justice of the case may require. The certificate, however, will be no discharge, unless the court shall, in writing under hand and seal, certify to the court of review that the bankrupt has made a full discovery of his estate and effects, and in all things conformed to the bankrupt law, and that there does not appear any reason to doubt the truth or fulness of such discovery; nor unless the bankrupt make oath in writing that the certificate was obtained fairly and without fraud. The certificate must also, after such oaths, be confirmed by the court of review, against which confirmation any of the creditors may be heard before such court.

In the exercise of the new authority given to the commissioner by the above section, he will of course be materially influenced (except in the power given to him now to inquire into the bankrupt's conduct before his bankruptcy) by the former decisions of the lord chancellor and the court of review upon petitions to stay the certificate; for the same reasons that have been assigned for allowing or staying the certificate¹ by the lord chancellor or the court of review, will equally apply to the allowance or disallowance of it by the commissioner. And it would seem, that only those creditors are entitled to be heard against the allowance of the certificate, who had formerly a right to sign it. Therefore a creditor who is not entitled to a dividend,—as a creditor on a bond of indemnity who has not been damnified,² or who has, after proof, been fully paid by the surety;³ a receiver appointed to prove and receive dividends,⁴ or a petitioning creditor, who has not proved his debt at a public meeting,⁵—as

¹ See post, section 2; and section 3, "When the Certificate is Void."

² *Ratcliffe v. Gunson*, 6 Mad. 193.

³ *Ex parte Shaw*, 1 G. & J. 151.

⁴ *Ex parte Buckner*, 1 C. B. L. 462.

⁵ *Ex parte Wyatt*, 2 D. & C. 211.

⁶ *Ex parte Davis*, 2 Cox, 398.

none of these could formerly sign the certificate—ought not to be permitted to be heard against its allowance.

By section 40 it is declared that any contract or security made or given by the bankrupt, or any other person, unto or in trust for any creditor, or for securing the payment of any money due by the bankrupt at his bankruptcy, as a consideration, or with intent to persuade the creditors to forbear opposing,¹ or to consent to, the allowance or confirmation of the certificate, shall be void; and the money thereby secured, or agreed to be paid, shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give the act and the special matter in evidence.

And by section 41, if any creditor shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose, or for consenting to the allowance or confirmation of the certificate, the creditor is liable to a forfeiture of the treble² value or amount of such money, goods, chattels, or security, which (by section 82) may be sued for by the assignees of the bankrupt's estate in any of the superior courts of record, and the money so recovered is to be divided among the creditors. It seems, also, that, under these circumstances, the certificate would be void, on the ground of fraud generally, although there is no express provision to this effect in the statute.

The bankrupt, it seems, is entitled to the inspection of the proceedings under the commission, for the purpose of ascertaining the debts proved, with a view to solicit his creditors not to oppose his certificate.³

Even if the money is to be divided among *all* the creditors,⁴ or is paid by a third person *without the privity* of the bankrupt,⁵ the certificate will be equally void; since great corruption and oppression might arise from a combination of all the creditors to exact conditions for their consent to the certificate.⁶ And, for the same reason, a guarantee given by a third person to a creditor, to induce him to sign the certi-

¹ Under the former statute it was held, that although a bill of exchange given to a creditor to sign the certificate was void, yet, if it was given merely to prevent opposition to it, it was good in the hands of a *bonâ fide* holder, without notice. *Birch v. Jervis*, 3 C. & P. 379.

² Before this enactment, the amount only of the money so obtained could be recovered back. See

Smith v. Bromley, 2 Doug. 696, n. *Cockshott v. Bennett*, 2 T. R. 766. *Neret v. Wallace*, 3 T. R. 17. *Cole v. Lovell*, 1 Esp. 282. Ex parte *Minton*, 3 D. & C. 688.

³ Ex parte *Morgan*, 1 G. & J. 404.

⁴ *Jones v. Barkley*, 2 Doug. 655, n. 3.

⁵ *Holland v. Palmer*, 1 Bos. & P. 95. Ex parte *Butt*, 10 Ves. 359.

⁶ Per Lord M. 2 Doug. 698.

ficate, and to trust the bankrupt with goods, was held to be void.¹

It may, on the first view, seem a hard case upon the bankrupt—when a third person, without the least knowledge on his part, gives money to obtain a creditor's consent—that the certificate should for this reason alone be held void.² The principle on which this doctrine is founded is, that although the bankrupt shall not be punished for the fraud of a third person, yet he shall not *avail* himself of it.³

If a creditor is even induced by money to *withdraw* a petition presented against the certificate—or after such a petition sells his debt, with an agreement to withdraw his petition,—this will also avoid the certificate; and in order to prevent such practices, (which, it seems, were at one time not unfrequent,) petitions against a certificate are now not permitted to be withdrawn, as a matter of course.⁴

The same principle (in regard to the *privity of the bankrupt*.) applies to a contract or security to pay money, as well as to money actually paid; it being perfectly immaterial whether the one or the other is paid or given with or without his knowledge—and whether, also, the agreement is to pay money to individual creditors, or to *all* the creditors.⁵ In like manner, where the security is given, in consideration of the creditor *withdrawing* a petition preferred by him against the bankrupt's certificate, the same principle which applies when money is paid, will render the certificate equally bad.⁶

¹ *Hankey v. Cobb*, 1 Ad. & E., N. S. 490.

² 1 Doug. 228. 10 Ves. 359.

³ Under the former law, though the bankrupt was prevented from deriving any benefit from a certificate, to which the signature of a creditor had been thus obtained, yet he was not precluded from procuring *another* certificate sufficiently signed, without the signature of the creditor who had received the money; and the lord chancellor would, in such a case (upon the application and affidavit of the bankrupt) assist him in so doing, by ordering the first certificate to be cancelled, that he might be enabled to procure a fresh one. (*Ex parte Harrison*, 4 Mont. B. L. App. 36. Per Eyre, C. J. *Holland v. Palmer*, 1 Bos. & P. 96.) And Lord Mansfield said in a case of this kind,—if

there were creditors enough who would sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign, for the mere purpose of preventing the bankrupt from receiving any benefit from the certificate,—that this would be a fraud on the bankrupt, and would not hurt him.

⁴ *Ex parte Gibson*, 1 C. B. L. 465. 6 Ves. 5.

⁵ *Jones v. Barkley*, 2 Doug. 695. *Holland v. Palmer*, 1 Bos. & P. 95. *Ex parte Butt*, 10 Ves. 359.

⁶ *Summer v. Brady*, 1 H. B. 647. A different doctrine was formerly held in *Lewis v. Chase*, 1 P. Wms. 620, but that case has been long exploded as an authority. See Lord Loughborough's judgment, 1 H. B. 655.

And though the bankrupt gives a promissory note for a pre-existing debt to a creditor, who has not proved under the fiat, yet the note will not be altogether invalid, for, independently of a security being void, which is given to a creditor to induce him to sign the certificate, it is against public policy that anything *leading to that result* should be allowed.¹

The principle of these decisions is also extended to the case of an *insolvent*, who assigns over his effects for the benefit of his creditors,² or who is discharged under the provisions of the insolvent debtors' act. And where a creditor withdrew his opposition on receiving from the insolvent a promissory note for the amount of his debt, upon which note he sued the insolvent, who settled the action by giving a warrant of attorney, it was held that the warrant of attorney was equally void with the note, for no subsequent arrangement can render that legal which was in its origin illegal.³ But a further security given by a third person to a creditor, for the *same amount* only as he would be entitled to in proportion with the other creditors, has been held (in the case of a *deed of composition*) not within the principle; as the creditor was not to receive more than the others.⁴ This point, however, it is apprehended, would not be so decided in the case of a bankrupt's certificate,—the statute expressly declaring, that *any security whatever* for the payment of money, with intent to persuade the creditors to forbear opposing, or to consent to the certificate, shall be void.⁵

By a general order of Lord Apsley, the commissioners are directed to inquire, whether the bankrupt ever, and how long before, had obtained a certificate under any former commission, or had been discharged under any act for the relief of insolvent debtors; and in case they have reason to believe either the one or the other of these facts, the commissioners are directed to proceed upon such inquiry, and hear the evidence thereon in the presence of the bankrupt, who is to be informed of the subject of the inquiry, and to be at liberty to lay evidence before them relating thereto. And, in case any of such matters appear to the commissioners, they are directed, at the time of making their certificate, also separately to certify to the lord chancellor such of the said matters as they find to be true, and to transmit such separate

¹ *Haywood v. Chambers*, 5 B. & A. 753.

² *Jackson v. Lomas*, 4 T. R. 166; and see *Cockshott v. Bennett*, 2 T. R. 763.

³ *Rogers v. Kingston*, 2 Bing. 441.

⁴ *Feise v. Randall*, 6 T. R. 146.

⁵ 6 Geo. 4, c. 16, s. 125; 5 & 6 Vict. c. 122, s. 40.

certificate to the secretary of bankrupts, to be laid before the lord chancellor at the same time with the other certificate.

And, by a general order of Lord Eldon,¹ the signature and sealing of the certificate by the commissioner must be attested in writing by the solicitor to the commission, or some clerk of the solicitor—or by the messenger to the commission, or by some clerk of the commissioner.

The discretion of the commissioner, as to allowing the bankrupt's certificate, is subject to no control; he is to be governed entirely by his own opinion, whether the bankrupt has dealt fairly, or fraudulently, by his creditors. The jurisdiction of the commissioner in this respect is, indeed, as distinct, as uncontrollable, and as much without appeal, as that of the lord chancellor himself. The court of review may render the certificate nugatory by withholding its confirmation, or recommend the commissioner to review his judgment, in case he refuse to certify, yet neither that court nor the lord chancellor can exercise any controlling authority over him on this subject.² And where the commissioners had, on one occasion, given certain reasons in writing to the lord chancellor for refusing to sign the certificate, and the bankrupt petitioned that the commissioners should produce them, Lord Erskine dismissed the application.³ A *mandamus*, therefore, will not lie to compel a commissioner to sign a bankrupt's certificate.⁴ And where a certificate has been allowed by the commissioner, and is sent back to him by the court of review, for the purpose of letting in the proof of other creditors, the commissioner is not confined to that object; and if he cannot conscientiously and judiciously re-certify what he has certified before, he is not compellable to do so; neither is he bound by his former certificate. He may, therefore, in such case, refuse to sign a *supplemental* certificate. It seems that the original and supplemental certificates are considered but as one act, the supplemental one giving the date to the whole; so that if the commissioner was to certify with reference to the subsequent proceedings, he would be understood to re-certify all that was contained in the original certificate.⁵

The commissioner, in examining the bankrupt's conduct

¹ August 8, 1809. And see *ex parte Jones*, 1 G. & J. 186.

² *Ex parte King*, 11 Ves. 417. 13 Ves. 181. 15 Ves. 126.

³ 13 Ves. 182.

⁴ *Ex parte John King*, 7 East, 92; and see *per Lord Hardwicke. Ex parte Williamson*, 1 Atk. 82.

⁵ *Ex parte King*, 15 Ves. 126. This bankrupt, of notorious memory, applied upon four different occasions to two successive chancellors, as well as the court of King's Bench, to compel the commissioners to sign his certificate.

previous to allowing his certificate, is not now, as formerly,¹ confined to his conduct *since he became a bankrupt*—but may inquire into his conduct *before*, as well as after, his bankruptcy.² The bankrupt is not bound to pay the fee for the signature of the commissioner to his certificate, but it seems that the assignees are now liable to pay it.³

SECTION II.

Of the Confirmation of the Certificate by the Court of Review, and herein of opposing such Confirmation; the Allowance, and recalling the Certificate after being so confirmed.

When the certificate is allowed by the commissioner, in order to be of any effect, it must be confirmed by the court of review, before which formality it is in law considered as no certificate.⁴ Previous to this proceeding, however, the bankrupt must make oath in writing, that the certificate of the commissioner, and the consent of the creditors, were severally obtained without fraud.⁵ If a petition is presented against the certificate, it is immediately stayed, until the petition is heard by the court of review, which is set down to come on in the usual course. The petition should be served upon the bankrupt, that he may have an opportunity of answering the allegations contained in it; and, if the court eventually makes an order to stay the certificate, such order should be drawn up within three months, or the certificate will be confirmed.⁶

As soon as the certificate is confirmed by the court of review, it should be entered of record at the bankrupt office, and have a memorandum of such entry indorsed thereon by the proper officer, or his deputy, pursuant to the requisitions of the 6 Geo. 4, c. 16, s. 96; otherwise it will not be receivable in evidence in any court of law, or equity.

¹ 1 V. & B. 47, 48. 1 Rose, 190.

² See ante.

³ Re Dawson, 3 D. & C. 317.

⁴ Ex parte Sawyer, 1 Rose, 141.
⁵ 7 T. R. 296. Ex parte Ansell, 19 Ves. 208. Ex parte Pavey, 2 G. & J. 358. The former statutes of 4 & 5 Ann. 5 Geo. 1, and 5 Geo. 2, enabled two of the judges (as well as the lord chancellor) to allow and confirm the certificate, upon the consideration of it being

referred to them by the great seal; but the practice of referring it to the judges for a long time became obsolete. Ex parte Saumarez, 1 Atk. 84, 87.

⁶ 5 & 6 Vict. c. 122, s. 39; and see ex parte Carruthers, 3 M. D. & D. 269, overruling ex parte May, 2 M. D. & D. 381, and ex parte Waterhouse, ibid. 760.

⁷ Lord Loughborough's General Order, 22nd March, 1796.

The certificate, as well as all other proceedings under a fiat in bankruptcy, are exempted from any stamp duty.¹

By a general order of Lord Apsley,² when any certificate was brought to the secretary of bankrupts in order for allowance, he was directed to search for and certify to the lord chancellor, whether he could find any previous certificate having been before allowed to the same bankrupt.

There are no compulsory words in the statute to oblige the court of review to confirm the certificate, which is entirely a matter resting in the court's discretion,³ though, at the same time, not quite arbitrarily so; as it must proceed by certain rules pointed out by the act of parliament, and established by a series of decisions in bankruptcy. If these requisites are complied with, the court ought to confirm the certificate: if not complied with, or if there is ground for him to think that there is fraud or concealment on the part of the bankrupt, the court may absolutely refuse to confirm it.⁴ In considering the propriety of allowing the certificate under the former law, the authority of the lord chancellor, like that of the commissioners, was confined to the investigation of the bankrupt's *conduct under the commission*; and the chancellor had no power to take into his consideration any circumstance affecting the bankrupt, which was entirely *unconnected* with the bankruptcy.⁵ And it may be doubtful whether the court of review has any greater power, for no authority is expressly given to that court as to the commissioners to inquire into the conduct of the bankrupt *before*, as well as after his bankruptcy. In granting or withholding the certificate, however, the lord chancellor was influenced by a number of considerations, to which the commissioners were not to attend.⁶

If all the requisites have been complied with, previous to laying a certificate before the court of review for confirmation, it may be confirmed, even after the death of the bankrupt.⁷ And where a *joint* certificate of two bankrupts has been allowed, and one dies before confirmation, it will be confirmed as the separate certificate of the survivor.⁸

Any creditor who has proved, or even been admitted a claimant,⁹ under the fiat, and who has good grounds for

¹ 6 Geo. 4, c. 16, s. 98.

² 12th February, 1774.

³ And see ante, 627.

⁴ Per Lord Hardwicke, 2 Ves. 249. 1 Atk. 82.

⁵ Ex parte *Gardner*, 1 Ves. & B. 45.

⁶ Ex parte *King*, 11 Ves. 421.

⁷ *Bromley v. Goodere*, 1 Atk. 7.

⁸ Ex parte *Currie*, 10 Ves. 51.

Ex parte *Cosart*, 1 G. & J. 248.

Ex parte *Carter*, 3 D. & C. 549.

⁹ Ex parte *Fyde*, 1 Atk. 73. Ex parte *Williamson*, *ibid.* 81.

opposing the confirmation of the bankrupt's certificate, may do so by petition to the court of review, although his debt does not amount to 20*l*.¹ But where there were accounts depending between certain parties and the bankrupt, and they would not swear to a balance in their favour, they were not allowed to petition² against the certificate.

A *mortgagee* may petition to stay the certificate, if he has used due diligence to establish the amount of the probable debt;³ but, if he does not swear that he believes a balance will be due to him after the sale of the mortgaged premises, the petition will be dismissed.⁴ And if there is a dispute as to the probable amount of the balance, the certificate will be directed to be deposited in the bankrupt office, subject to further orders.⁵ So, a *receiver* appointed by the court to prove and receive dividends, may petition to stay the certificate.⁶ The *partner* of the bankrupt may petition to stay the certificate, until the partnership accounts are taken, no want of due diligence being imputable to the petitioner.⁷

A creditor, who becomes bankrupt himself after proving his debt, may petition to stay the certificate of the first bankrupt, if the assignees of the creditor do not interfere.⁸

A creditor, who has *not proved* his debt, may nevertheless petition that the certificate be stayed, in order to give him an opportunity of proving, and of assenting to, or dissenting from, the certificate—provided he gives a satisfactory reason for his not having proved before.⁹ But where a creditor has been guilty of *laches*, in not proving his debt—though he omitted to do so, upon the supposition that he would be entitled to elect—he cannot petition to stay the certificate.¹⁰ And where a creditor, eight months after the issuing of the commission, presented such a petition, and did not account for the delay, the petition was dismissed with costs.¹¹ The certificate also, will not be stayed, upon the petition of a creditor, who has no intention to come in under the fiat, and who has the means of trying the validity of the certificate at law.¹²

¹ Ex parte *Allen*, 7 Vin. 134.

² Ex parte *Johnson*, 1 Atk. 81.

³ Ex parte *Whitchurch*, 1 G. & J.

71. ⁴ Ex parte *Ramsbottom*, 2 Christ.

501.

⁵ 1 G. & J. 71.

⁶ Per Lord Eldon. Ex parte

Shaw, 1 G. & J. 151. Ex parte

Evans, 1 Mont. B. L. 332.

⁷ Ex parte *Hadley*, 1 G. & J. 193.

⁸ Ex parte *Taylor*, 4 D. & C. 125.

⁹ Ex parte *Adams*, 2 Bro. 48.

Ex parte *Dyson*, 1 Rose, 67, note.

Ex parte *Birch*, 1 Mad. 100. Ex

parte *Bray*, 3 D. & C. 495.

¹⁰ Ex parte *Bentley*, 2 Cox, 218.

Ex parte *Warwick*, 14 Ves. 138.

¹¹ Ex parte *Smith*, 1 G. & J. 195.

¹² Ex parte *Dodson*, Buck, 225.

A creditor, who has taken the bankrupt in execution, has been permitted to petition to stay the certificate;¹ but if the bankrupt is in custody, he must be discharged before he presents his petition, otherwise it will be dismissed with costs.²

Any tampering of the petitioner with the bankrupt, or his friends, is a sufficient preliminary objection to the hearing of a petition to stay a certificate; but where a creditor, believing the commission to be invalid, does not prove under it, but acted adversely, and declared to the bankrupt and his friends, that he meant to petition for a *supersedeas*, and also to stay the certificate, unless his debt was paid or satisfied;—this was held to be not such a tampering, as was sufficient to operate in bar of his petition.³

Creditors, who have forborne to oppose the allowance of the bankrupt's certificate by the commissioner, may, nevertheless, be heard against its confirmation by the court of review; and the confirmation has, upon former occasions, been sometimes refused, and sometimes adjourned by the lord chancellor,⁴ even when there was no opposition to the certificate.

There are various grounds for *suspending* the confirmation of the certificate, depending on the circumstances of each particular case: those for *refusing* it *entirely*, are specifically defined by the 38th section of the 5 & 6 Vict. c. 122, which in certain instances therein mentioned, says, that the bankrupt shall be wholly deprived of it.⁵ In the first case,—though there may be cause for *suspending* the allowance, the certificate, if *granted*, will nevertheless be good; in the last, where the statute positively says that the bankrupt shall not be entitled to it, the certificate will be invalid, notwithstanding the confirmation of it by the court of review. But in both cases, whether of suspension or refusal, the power of the court of review is subject to no appeal, except in matter of law, or the admission or rejection of evidence.

Where there has been too much precipitancy in the allowance of the certificate by the commissioner, the court of review will suspend the allowance of it; as, if it is allowed so soon after the bankrupt's last examination, as to prevent the principal creditors (who live abroad) from having time to

¹ Ex parte *Joseph*, 18 Ves. 340.

⁴ Per Lord M. *Tudway v. Bourne*,

² Ex parte *Blaydes*, 1 G. & J.

2 Burr. 718.

³ Ex parte *Lord*, 2 Rose, 421.

⁵ See post, section 3.

⁴ Ex parte *Paterson*, 1 Rose, 402.

inquire into the bankrupt's conduct, or to prove their debts.¹ And Lord Hardwicke said, in a case of this kind, that he disapproved extremely of commissioners being so precipitate in signing certificates; for that such hasty proceedings inverted the very intention of the bankrupt acts, which were made in favour of creditors, but were too often abused for the service of insolvent persons.² After a full time, however, has been allowed a distant creditor for inquiry, and for sending an affidavit over to prove his debt, the certificate will be allowed; for certificates are not to be locked up for ever, and the bankrupt deprived of that liberty which the law has given him.³

Where the commission is taken out under a wrong description, the certificate will be stayed, until proper advertisements have been inserted for the creditors.⁴

If no dividend has been made of the bankrupt's effects, that is a strong reason for staying the certificate, but it is not, of itself, a conclusive reason.⁵ In this respect, it seems that Lord Eldon and Lord Thurlow have differed from Lord Loughborough and Lord Erskine in their judgments; the two latter having, it is said, been of opinion, that it *was* a sufficient reason for staying the certificate.⁶

A certificate has been refused to be stayed upon the petition of creditors in Scotland, stating that the bankrupt was properly the object of a sequestration, and that the question of sequestration was then depending in the court of session.⁷ So if the debt of a creditor, who has proved under the commission, and signed the certificate, is not impeached, an objection to the proof in *point of time* is not sufficient to stay the allowance.⁸ And where creditors, who had been admitted to claim debts under a commission, opposed the allowance of the certificate, and the bankrupt swore positively that the balance, on taking the account, would be in his favour—and the claimants did not venture to swear that there would be any balance in *their* favour;—the lord chancellor refused to stay the allowance; for he said, that barely coming before the commissioners, and saying there is such a debt, is not sufficient without an affidavit, when

¹ Ex parte Saumarez, 1 Atk. 84.
Ex parte Lord, 2 Rose, 421. Ex
parte Basarro, 1 Rose, 266.

² 1 Atk. 84.

³ Ex parte Williamson, 1 Atk. 82.

⁴ Ex parte Gibson, 6 Ves. 5. Ex
parte Malkin, C. B. L. 451.

⁵ Ex parte Green, 4 D. & C. 112.

⁶ Ex parte King, 11 Ves. 426.

Ex parte Cunningham, 2 Mont. Dig.
152.

⁷ Ex parte Cockayne, 2 Rose,
233.

⁸ Ex parte Stracey, 1 Rose, 66.

opposed to the positive oath of the bankrupt.¹ Neither will a certificate be stayed, because there is a petition pending to annul the fiat; for a certificate must stand upon its own merits.² Nor will it be stayed, because the fiat has been concerted.³

Where new creditors prove their debts, after the certificate has been allowed by the commissioner, it will not be stayed on this account—unless the new creditors themselves petition for that purpose, and make out a case of the certificate having been fraudulently obtained.⁴

A certificate, also, will not be stayed in order to give a creditor (who insists on a right to stop *in transitu*, and is waiting the result of a trial at law) an opportunity of proving under the commission, in case he should fail in his action.⁵ Neither will it be withheld, because the commissioner has merely omitted to certify that the bankrupt has been a bankrupt before, in conformity with Lord Apsley's order.⁶ So, when the bankrupt is uncertificated under a former fiat, that is no ground for staying the certificate, for though the second fiat were absolutely void *at law*, yet, if circumstances required it, a court of *equity* would sustain that fiat, and interfere to prevent the production of the first.⁷

It has been held likewise to be no ground for staying a certificate, that the bankrupt's accounts are in a slovenly state—unless, indeed, he has refused his assistance to explain or elucidate them.⁸ But, when it appears that the bankrupt's statement on his examination is in itself inconsistent—as where he deposed, that he had no written documents except a book produced, which book appeared to have been compiled from other written documents—the certificate will then be stayed.⁹ And, where the bankrupt's partner petitions that the certificate may be stayed, until the partnership account is taken, and there is no want of due diligence imputable to the petitioner, we have seen,¹⁰ that that is a good cause for making the application.¹¹

It is no objection, however, to the allowance of the certificate, that the bankrupt has retained money in his hands, as

¹ *Ex parte Johnson*, 1 Atk. 81.
Ex parte Williamson, 2 Ves. 249.

² *Ex parte Benson*, 2 Rose, 61.

³ *Ex parte Smith*, Mont. 11. *Ex parte Green*, 2 M. & A. 33.

⁴ *Ex parte Fydale*, 1 Atk. 73.

⁵ *Ex parte Heath*, 6 Ves. 613.

⁶ *Ex parte Black*, 1 Rose, 60.

⁷ *Ex parte Thompson*, 1 Rose, 285.
See *Butler v. Hobson*, 5 Scott, 824,
and 5 Bing. N. C. 128; and ante,

472.

⁸ *Ex parte Rawson*, 1 Rose, 67.

⁹ *Ex parte Bangley*, 17 Ves. 117.

¹⁰ Ante, 634.

¹¹ *Ex parte Hadley*, 1 G. & J. 193.

assignee under another fiat; for the statute provides a specific remedy¹ for that particular mischief.²

A certificate under a *separate* fiat, lying for confirmation by the court of review, will not be stayed merely because a *joint* fiat is issued; but if the certificate is fairly obtained, the court will confirm it; and, in order to give it effect, will impound the separate fiat in the bankrupt office, instead of annulling it—and will direct the proceedings and proofs to be transferred to the joint fiat.³

As to those cases, where the statute provides that the certificate shall be *void*,⁴ even though it is confirmed—the court of review is, of course, bound absolutely to refuse the confirmation, if the opposing creditor adduces sufficient evidence before him to bring the bankrupt within any of those cases. But when the affidavits of the parties have been in direct opposition to each other, Lord Eldon generally allowed the certificate; because by refusing it, he said, the court withholds an opportunity to try the fact by a jury.⁵ Therefore, where a petition to stay the certificate alleged, that the bankrupt had acknowledged to have lost a particular sum by stock-jobbing transactions—and the bankrupt denied the loss on affidavit, though he admitted having made the acknowledgment,—the certificate was refused to be stayed; but the petition was dismissed without costs, as the acknowledgment was a justification of the petition.⁶

In a case, also, of *mere suspicion*, the court will refuse to stay the certificate.⁷ Thus, where a petition contained no other grounds of opposition, than that the party was *informed and believed*, that the bankrupt had concealed his effects, the petition was dismissed with costs.⁸ For, if the certificate is allowed under such circumstances of conduct in the bankrupt, as make it bad in law, the allowance then becomes altogether a nullity; but if it be withheld by the court, the bankrupt has no other means of obtaining his certificate.⁹ When, however, a creditor has proved his debt under the fiat, which renders him unable to bring an action at law against the bankrupt to try the validity of the certificate, the lord chancellor in such a case frequently directed

¹ Sections 104, 105.

² Ex parte *Anderson*, 1 Rose, 98.

³ Ex parte *Tobin*, 1 Ves. & B. 308.

⁴ Section 38, post.

⁵ Ex parte *Kennet*, 1 Ves. & B. 193. 1 Rose, 331.

⁶ Ex parte *Enderby*, 5 Mad. 76.

⁷ Ex parte *Hall*, 1 Rose, 3.

⁸ Ex parte *Joseph*, 1 Rose, 184. 18 Ves. 340.

⁹ Ex parte *Scott*, Buck, 279.

an issue, in order to determine the controverted fact. Thus, where such a creditor petitioned against the allowance of the certificate, on the ground of the bankrupt having lost money at a horse-race; and it appeared, from the bankrupt's last examination, that he had in fact subscribed to a stake to be run for at Bedenell races;—an issue was directed to try the bankrupt's loss, in which the opposing creditor was to be plaintiff, with liberty to read upon the trial the bankrupt's last examination, and a declaration of the chancellor's opinion, that under the statute it amounted to proof of gaming, unless it should be answered by other evidence.¹ But when the fact of the gaming is not disputed, Sir J. Leach said it would be too much to send the creditor to prove that which has been already admitted.² And where a petition imputed conduct to the bankrupt which amounted to felony, the lord chancellor would not in that case direct an issue to try the fact of the bankrupt's conformity; saying that the bankrupt would then be in a worse situation, than if the fact were tried by affidavits before the chancellor, in which proceeding both parties are heard.³

Upon a petition to stay the certificate, it has been frequently sent back to the commissioners, that they may review it; but where the ground of opposition is, that a full discovery has not been made, this practice has been held to be improper.⁴

There is one exception in practice to the rule, that the court of review will not confirm a certificate, which (if confirmed) might be void in law—and that is, (as we have already observed,⁵) in the case of a certificate under a second fiat, where the bankrupt has not got his certificate under the first. For, in this case, though the certificate (as well, indeed, as all other proceedings,) under the second fiat might be void at law, yet the lord chancellor has, under certain circumstances, sustained a second commission by preventing the production of the first, and has not refused to allow the certificate under such second commission.⁶

Where the application to stay the certificate was on the ground of concealment of property by the bankrupt, the circumstances attending which were afterwards (by the examination of the bankrupt and other persons) disclosed

¹ *Ex parte Henderson*, Buck, 557.

² *Ex parte Newman*, 2 G. & J. 329.

³ *Ex parte Scott*, *supra*.

⁴ *Ex parte Bangley*, 17 Ves. 117. 1 Rose, 187, n.

⁵ *Ante*, 637.

⁶ *Ex parte Thompson*, 1 Rose, 285.

to the commissioners—but the whole property had been delivered up to the assignees before the signature of the certificate by the commissioners;—the vice-chancellor held that he ought not, in such a case, to refuse the certificate, as the commissioners had thought fit to sign it with a full knowledge of the facts.¹

Where a bankrupt suffered *fictitious debts* to be proved, Lord Eldon (even before the passing of the 6 Geo. 4, c. 16, which first included this as one of the causes for invalidating a certificate,) declared that he would never in such a case allow the certificate.²

When any *fraud* has been practised by the bankrupt, either in obtaining the certificate, or in the course of proceedings under the fiat—which is not discovered until after the certificate has been allowed—the lord chancellor has in such a case *recalled* it, if it could be done without injury to persons who had been engaged with the bankrupt in subsequent transactions.³ And so also, when any conduct of the bankrupt previous to the issuing of the commission has been brought to light, which would of itself render the *certificate void*. Thus, where it appeared that a bankrupt had, within a year before the commission issued, lost more by gaming in one day than the sum then limited by the statute, Lord Macclesfield ordered the certificate to be recalled and disallowed.⁴ So, where an imposition was practised upon the great seal, in the manner in which the certificate was lodged at the bankrupt office for allowance—Lord Manners declared his intention to revoke the certificate, (though a period of *three years* even had elapsed since the allowance,) if, upon inquiry before the commissioners, it was found that it could be done without injury to other persons.⁵ And Lord Eldon also, in one instance, ordered a certificate to be recalled, which had been obtained *two years* before;—where it was discovered that the commission had been issued *fraudulently* by the bankrupt—and

¹ *Ex parte Bryant*, 1 G. & J. 205. But quære, whether such a certificate would not be considered void under 6 Geo. 4, c. 16, s. 130.

² *Ex parte Shirley*, 2 Rose, 71. *Freydeburgh's case*, 3 Ves. & B. 142. *Ex parte Laffert*, 1 Rose, 330.

³ *Davies*, 437. *Ex parte Cawthorne*, 2 Rose, 186. *Ex parte Tellis*, 1 Ball & B. 321.

⁴ Lord Cowper and Lord Talbot, then at the bar, afterwards gave opinions doubting the power of the lord chancellor to *recall* the certificate; but it does not appear that their opinions were ever acted upon. *Whitm*. 383.

⁵ *Ex parte Tellis*, 1 Ball & B. 321.

that with his connivance debts had been proved under the commission, by the preponderance of which the certificate had been obtained.¹

The certificate, however, when once obtained, cannot be got rid of in every case in which it might have been stayed.² Thus, where the opposing creditor had previously failed to make out a case upon a petition to stay the certificate, and the bankrupt had been *six years* in the possession of it, and had been suffered to go into the commercial world, and involve himself and others in all the consequences of an extensive trade;—Lord Eldon refused to recall the certificate, notwithstanding there was strong suspicion of its having been obtained unfairly, and dismissed the petition with costs.³ So, where a creditor, who had not proved his debt under the commission, applied to the lord chancellor after the certificate was allowed, for liberty to inspect all the bankrupt's books, suggesting that he had been guilty of gambling transactions—and the lord chancellor had ordered the secretary of bankrupts to look into the books for a particular instance, but none such was found;—Lord Eldon, upon counsel pressing for further inquiry, said he doubted very much, when a certificate had been allowed, whether a person, who was no creditor under the commission, could come in this way for a discovery, to obtain which he might file a bill—and refused the further inspection of the bankrupt's books, for the purpose of avoiding the certificate.⁴ And as a certificate will not (as we have seen)⁵ be *stayed*, where the circumstances against the bankrupt amount only to strong *suspicion*, still less will it be *recalled* on that account; for there must be a *very clear* case established against him, to induce the court to make an order of the latter description.⁶

SECTION III.

When the Certificate is Void.

By 5 & 6 Vict. c. 122, s. 38,⁷ certain cases are specified, where the bankrupt is not only not entitled to his certificate,

¹ *Ex parte Cawthorne*, 2 Rose, 186. 19 Ves. 260.

² *Per Lord Eldon*, 6 Ves. 614.

³ *Ex parte Read*, Buck, 430.

⁴ *Ex parte Dawson*, 6 Ves. 614.

⁵ See ante, 638.

⁶ *Ex parte Hood*, 1 G. & J. 219.

⁷ This is taken from 5 Geo. 2, c. 30, ss. 7, 12; and 6 Geo. 4, c. 16, s. 130.

but where it is declared to be absolutely *void*, even after it is obtained. They are as follows :

1st. When he has lost by any sort of *gaming*, or *wagering* in one day 20*l.*—or, within one year next preceding his bankruptcy, 200*l.* And gaming will invalidate the certificate, though the bankrupt wins on the same day more than the sum lost.¹ Where a plaintiff gives evidence of gaming to avoid the certificate, he must elect, whether he will confine his evidence to one loss amounting to 20*l.*, or to several losses amounting to 200*l.*² The court of review will without an issue decide the fact of the gaming, when it is not disputed.³

2ndly. Where the bankrupt has, within one year next preceding his bankruptcy, *lost* 200*l.*⁴ by any contract for the purchase or sale of any government or other *stock*, where such contract was not to be performed within one week after the contract; or where the stock bought, or sold, was not actually transferred, or delivered in pursuance of such contract.

3rdly. Where, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the bankrupt law, the bankrupt has *destroyed, altered, mutilated, or falsified*, or caused to be so done, any of his *books, papers, writings, or securities*—or made, or been privy to the making of, any *false or fraudulent entry* in any book of account or other document, with intent to defraud his creditors.⁵

4thly. Where he has *concealed any part of his property*. If a plaintiff, however, seeks to avoid a bankrupt's certificate, by proving concealment of his property, the defendant may show that the concealment was not wilful.⁶ Where the bankrupt had secreted part of his effects—but the circumstances attending the concealment were afterwards, by the examination of the bankrupt and other persons, disclosed to the commissioners—and the whole property had been delivered up to the assignees *before the signature* of the certificate by the commissioners;—the vice-chancellor thought he ought not to stay the certificate on this ground, as the concealment meant by the 5 Geo. 2, c. 30, s. 7, was a concealment *at the time of signing the certificate*.⁷ And if this decision is correct, there

¹ Ex parte *Newman*, 2 G. & J. 329.

² *Hughes v. Morley*, 1 Holt, 520.

³ Ex parte *Newman*, 2 G. & J. 329.

⁴ The sum was 100*l.* in each of these cases by the 5 Geo. 2, c. 30, s. 12.

⁵ This provision was first contained in the 6 Geo. 4, c. 16, s. 130.

⁶ *Cathcart v. Blackwood*, Dom. Proc. 1765.

⁷ Ex parte *Bryant*, 1 G. & J. 205.

seems to be no reason why the parallel clause of the 5 & 6 Vict. c. 122, should not receive the same construction.

5thly. Where, if any person having proved a false debt under the fiat, the bankrupt (being privy thereto, or afterwards knowing the same,) shall not disclose the same to his assignees, within one month after such knowledge.¹ Under this provision, the persons so permitted to prove are admissible witnesses to prove the fraud.²

Besides the above cases specified in the statute, there are also other instances in which the certificate (as we have already seen)³ is held to be void in law, on the ground of *fraud*; namely, where money has been given to a creditor either by the bankrupt, or a third person, to induce him to sign it—or to withdraw a petition against it.⁴

SECTION IV.

Of the Effect of the Certificate.

The certificate, when it is allowed by the lord chancellor, gives the bankrupt a general release in consequence of his certified conformity, discharging him from all debts due by him when he became bankrupt, and from all claims and demands proveable under the fiat.⁵ But the certificate will not bar an action of *tort* against the bankrupt for selling out the plaintiff's stock contrary to orders; although the plaintiff might have waived the tort, and proved his debt for money had and received.⁶

Nor an action of *assumpsit* for not accepting and paying for goods, which before his bankruptcy he had contracted for, to be delivered to him at a future day at a certain price,

¹ This provision, which was in substance contained in the 24 Geo. 2, c. 57, s. 9, was strangely overlooked in proceedings on petition to oppose the certificate; for where the bankrupt had permitted fictitious debts to be proved, the objection made to the certificate in consequence of such conduct, often proceeded on the mere ground of its proving that he had not made a complete disclosure. *Ex parte Laffert*, 1 Rose, 380. *Ex parte Shirley*, 2 Rose, 71. *Freydenburgh's* case, 3 Ves. & B. 142. The harsh

provision in the 5 Geo. 2, c. 30, s. 12, that a bankrupt should be excluded from the benefit of his certificate, if he had, upon the marriage of any of his children, advanced above 100*l.*—unless he could prove himself then solvent—is altogether omitted in the subsequent statutes.

² *Edmonstone v. Webb*, 3 Esp. 264.

³ *Ante*, 567.

⁴ *Ex parte Gibson*, C. B. L. 465. 1 Mont. 336; and see *ante*, 628.

⁵ 5 & 6 Vict. c. 122, s. 37.

⁶ *Parker v. Crole*, 5 Bing. 63.

though he obtained his certificate before that day arrived. For when the commission issued, it was impossible to say not only what amount of damage, but whether any damage, would be sustained by the plaintiff; for that could only be determined by the state of the market at a future day.¹ As to the different species of debts, therefore, which the certificate will operate in discharge of, the reader is referred to the respective heads in a former chapter relating to the proof of debts.

The certificate, however, will not discharge any person who was a partner with the bankrupt at the time of the bankruptcy—or who was then jointly bound, or had made any joint contract with him.² Neither does a creditor, who signs the certificate of surviving partners, thereby release the estate of a deceased partner.³ So, though the certificate will discharge one of several covenantors for the payment of an annuity, it will not discharge his co-sureties from the claim of the annuity creditor,⁴ although the annuity creditor has signed the bankrupt's certificate, and the surety has given him notice not to sign it.⁵ Nor will the certificate of a co-surety for the payment of an annuity be a discharge as to the claims for contribution of another co-surety, in respect of money paid on account of the annuity after the bankruptcy, inasmuch as one surety cannot prove the value of the annuity under a commission against his co-surety.⁶ The certificate operates as an extinguishment of debts contracted by the wife of the bankrupt, *dum sola*, and they do not revive against her upon the death of the husband.⁷

If the bankrupt's clerk continue in his service after his bankruptcy, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the fiat, up to the time of the dissolution of the contract.⁸

The privilege of creditors to prove, and of bankrupts to be discharged from debts, is, generally speaking, co-extensive and commensurate;⁹ and this principle is adopted by the new act, which (as we have just seen) provides that all claims

¹ *Boorman v. Nash*, 9 B. & C. 145. But see 6 Geo. 4, c. 16, s. 47; and note (d), 3 Dea. & C. 802.

² 6 Geo. 4, c. 16, s. 121. This provision was taken from the 10 Ann. c. 15, s. 2.

³ *Sleech's case*, 1 Meriv. 570.

⁴ *Baxter v. Nichols*, 4 Taunt. 90.

⁵ *Brown v. Carr*, 2 Russ. 600. 7 Bing. 508. 5 Moore & P. 497.

⁶ *Browne v. Lee*, 6 B. & C. 689.

⁷ *Lockwood v. Salter*, 2 Nev. & M. 355.

⁸ *Thomas v. Williams*, 1 Ad. & E. 685.

⁹ Per Lord Hardwicke, 1 Atk. 119.

and demands proveable under the commission shall be discharged by the certificate. There are only one or two exceptions to this general position of Lord Hardwicke;—but in this, as in other cases, *exceptio probat regulam*. One of these is, where a verdict in an action upon a *contract* is not obtained until after the bankruptcy of the defendant, in which case the costs resulting from the verdict and the judgment are not proveable under the commission, although they have been held to be barred by the certificate, as accessorial to the original debt. A plaintiff, therefore, who perseveres in an action against a bankrupt after the issuing of a commission, runs the risk of losing all claim against him for costs,—in case the debt, on which the action is brought, be barred by the certificate.¹ But, with the exception of a case of this description, debts proveable under the commission, and debts discharged by the certificate, may be said to be convertible terms.²

Thus, a surety for the bankrupt, who pays the debt even after the issuing of the commission—as he is now permitted to prove it against the bankrupt's estate³—will be barred by the certificate. And he will not only be barred from suing the bankrupt, for the recovery of money paid in discharge of the debt—but also from suing him for any consequential damage, accruing from the nonpayment by the bankrupt of such debt. As, where an acceptor of an accommodation bill brought an action against the drawer (who had become bankrupt) for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill,—the certificate was, in this case, held a good bar to the action.⁴ But the certificate will only discharge the bankrupt from the claims of the surety, as to those debts which the bankrupt *owes at the time* of his bankruptcy; therefore, where a surety for payment of the bankrupt's rent paid arrears which *became due after the bankruptcy*, the certificate was held no bar to an action against him by the surety for repayment of such arrears.⁵ Neither is the certificate of a co-surety a bar to an action for contribution brought by the

¹ *Willett v. Pringle*, 2 N. R. 196; and see Lord Eldon's judgment in *ex parte Hill*, 11 Ves. 649; and that of the vice-chancellor in *ex parte Poucher*, 1 G. & J. 386.

² *Bamford v. Burrell*, 2 B. & P. 11.

³ 6 Geo. 4, c. 16, s. 52.

⁴ *Vansandam v. Corsbie*, 3 B. & A.

13. *Wood v. Dodgson*, 2 M. & S. 195.

⁵ *M'Dougal v. Paton*, 8 Taunt. 584; 2 Moore, 644. *Watkins v. Flanagan*, 1 Bing. 413; 1 G. & J. 199. *Welsh v. Welsh*, 4 M. & S. 333. *Freeman v. Burgess*, 4 Bing. 416; and see *ante*, Ch. IX., sects. 12—21.

other co-surety, who does not pay the debt of the principal, until after the first co-surety had obtained his certificate, for this is a debt which cannot be proved under the 6 Geo. 4, c. 16, s. 52.¹

The certificate, however, does not discharge a bankrupt from a debt due to the *Crown*; for as the *Crown* is not bound by any statute, unless specifically named²—and the *King's debt* is not mentioned, among those of the creditors in general, in any part of the statute relating to the proof of debts or the certificate,—the *Crown*, of course, will not be barred of the peculiar privileges it possesses for the recovery of its own debts.

Nor is a bankrupt discharged by his certificate from his own express *collateral* covenant of indemnity, which is *not broken before his bankruptcy*, unless, indeed, there can be a value set upon the subject-matter of it, under the 56th section. Therefore, where the bankrupt covenanted to indemnify the assignor against covenants contained in a lease, which was assigned to the bankrupt before his bankruptcy,—it was held, that as this was a distinct and collateral covenant, in respect of which the assignor could have no remedy under the commission,—the bankrupt was not discharged by the certificate.³ And in a similar case, where the bankrupt gave a bond of indemnity to the lessee—which was, in fact, forfeited before the bankruptcy by rent becoming in arrear, but the lessee had not actually paid the rent to the lessor,—it was held that the certificate was no bar to the claims of the lessee, on the ground that a bond of indemnity against breaches of covenant is incapable of valuation, it being impossible to calculate how far the obligee may be damaged by any future breaches; and that the bond, therefore, in this case could neither be proved in respect of the penalty—nor could the lessee prove in respect of the rent in arrear, without having first paid it to the lessor—even if such a partial proof under a bond of indemnity could in strictness be admitted.⁴

The defendant, on certain considerations, undertook to pay the balance due on a bill of exchange, of which the plaintiff was acceptor; and he afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it. The defendant became bankrupt, and did not pay or give any indemnity,

¹ *Clements v. Langley*, 5 B. & Ad. 372; 2 Nev. & M. 269.

² *Rex v. Pixley*, Bunb. 202, 1 Atk. 262.

³ *Mayor v. Steward*, 4 Burr. 2446. *Ludford v. Barber*, 1 T. R. 86.

⁴ *Taylor v. Young*, 3 B. & A. 521. 8 Taunt. 318. 2 Moore, 326.

and the plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate. On an action brought by plaintiff for the breach of promise:—Held, that he could not have proved in respect of it under the defendant's commission, either for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of a surety; and, therefore, that the bankruptcy was no defence.¹

A claim founded on a certificate to charge a particular debt upon a specific fund, in which the covenantor has no present interest, but merely an expectancy, is not barred by the certificate of the covenantor, before he acquires an actual interest in the fund. Thus, where the bankrupt had granted an annuity to B., and covenanted to charge any property that he might become possessed of at his wife's death, either under her will, or otherwise, with the payment of the annuity; and, after he obtained his certificate, his wife died, having under a power in her settlement, bequeathed to him an annuity of 700*l.*; it was held, that the bankrupt was bound to execute a proper deed to charge the annuity of 700*l.* with payment of the annuity granted to B.²

The certificate also does not, *of itself*, protect the bankrupt from an action of a covenant, or assumpsit, by a lessor for non-payment of rent due after the bankruptcy, for which he has become liable either as lessee,³ or even as assignee of the lessee.⁴ Nor does the certificate operate as a release of the rent, or in any way affect the landlord's right to distress. Therefore, where a landlord had distrained the goods of A. in his tenant's premises, and the tenant afterwards became bankrupt and obtained his certificate, it was held that in an action of replevin at the suit of A., the landlord had a right to avow for a return of the goods.⁵ But by the 75th section of the new statute it is declared, that any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or be sued in respect of any subsequent non-observance, or non-performance, of the conditions, covenants, or agreements therein contained.⁶ And if the assignees decline the same, then the bankrupt will not be liable, in case he deliver up such lease or agreement to the

¹ *Yallop v. Ebers*, 1 B. & Ad. 698.

² *Lyde v. Myrm*, 4 Sim. 505; 1 Myl. & K. 683.

³ *Mills v. Auriel*, 1 H. B. 433.

⁴ T. R. 94. *Boot v. Wilson*, 8 East, 311.

⁵ *Copeland v. Stephens*, 1 B. & A. 593.

⁶ *Newton v. Scott*, 9 Mees. & W. 434; affirmed on appeal, 10 Mees. & W. 471.

⁶ This provision was first intro-

lessor, or to such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. This section, however, only applies in cases between the *lessor and lessee*, and does not extend to cases between the *lessee and the assignee* of the lease. Therefore, where an assignee of a lease gives a bond of indemnity to the lessee to protect him from the future non-payment of the rent, or non-performance of the covenants, and afterwards becomes bankrupt,—his certificate will not, as we have just observed, protect him from an action on the bond by the lessee, even though the breach declared upon took place before the bankruptcy¹.

There must be some *express act* done by the assignees to manifest their assent to the assignment as it regards the term, and their acceptance of the lease; for the general assignment of the bankrupt's personal estate under the commission does not, without such acceptance on their part, vest a term of years in the assignees.² Therefore, until some act of this sort is done by them, the term still remains in the bankrupt, even though he was but himself the assignee of the lease; and his certificate will not protect him from the payment of rent accruing due subsequent to the bankruptcy.³ If the assignees decline to take the lease, the bankrupt can (as we have seen) now exonerate himself, by delivering up the lease to the lessor within fourteen days after notice of the assignees' declining it. But until he does so deliver up the lease, the property in the demised premises continues vested in him, and the lessor retains not only his right of distress, but all other remedies, against the bankrupt as lessee or assignee of the lease.⁴ Nor will the bankrupt's surrender of the lease discharge his surety for the rent from the claims of the lessor for breach of covenant occurring between the date of the commission and the delivering up of the lease.⁵ But, if the

duced into the bankrupt law by the 49 Geo. 3, c. 121, s. 19, but the following part of it is new, and seems but a just provision to relieve the bankrupt from his liability, in case the assignees refuse the lease. As to what will amount to an acceptance of the lease by the assignees, see ante, 433.

¹ *Taylor v. Young*, 3 B. & A. 521.

² This does not appear to have been formerly the doctrine held by the courts, which inclined to the opinion, that the commission and

the proceedings under it actually dispossessed the bankrupt of his whole estate, transferring and vesting it absolutely in the assignees under the commission. *Mayor v. Steward*, 4 Burr. 2443, per Yates, J. *Cantril v. Graham*, Barnes, 69. *Wadham v. Marlow*, 8 East, 314; note (c.) Per Lord M.

³ *Copeland v. Stephens*, 1 B. & A. 591.

⁴ *Briggs v. Sowry*, 8 Mees. & W. 729.

⁵ *Tuck v. Fyson*, 6 Bing. 321.

assignees neglect to determine whether they will accept or decline it, there is no express power given by the statute to the *bankrupt* (as there is to the *lessor*) to apply to the lord chancellor for an order on the assignees, to elect whether they will take the lease or not; though there seems to be no reason why the lord chancellor should not, under his general jurisdiction in bankruptcy, as well, indeed, as under the equity of the statute, have power to make such an order, when circumstances call for it on the part of the bankrupt.

As the certificate discharges the bankrupt from all covenants in the lease, if the assignees accept it, his liability to the lessor will not be renewed (except as an assignee of the term), though he comes into possession of the premises afterwards under an assignment from his assignees. Thus, where A. granted a lease to B., which contained a covenant that B. should not underlet without the consent of A.—and B. having become a bankrupt, his assignees assigned the premises to C., who re-assigned them to B. after he had obtained his certificate—after which B. underlet the premises to another person;—it was held that B. having been discharged by his bankruptcy from all the covenants *as lessee*, the underletting by him was no¹ forfeiture of the lease.

A. agreed with B. by deed, that he A. would on payment of 900*l.*, as thereafter mentioned, grant, sell, and convey to B. the premises therein mentioned, and B. covenanted to pay the said sum on or before the 1st January then next, or whenever a good title to the said premises should be tendered to him; but it was agreed that if B. should on or before the 1st January, be desirous that that sum should remain a charge on the premises, then B. might require the same; so that upon the completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the sum of 900*l.* on the premises, with interest. Covenant by B. to pay the interest so long as the principal sum should remain unpaid: proviso, that in case the interest should be in arrear thirty days, B. should be considered *as a tenant to A.* of the premises from the date thereof, at the yearly rent of 40*l.* 10*s.*, payable on the 16th April and 16th October in every year; and that it should be lawful for A., his heirs and assigns, to enter and distrain, and to sell and dispose of the distress, or otherwise to deal with the same, in like manner as in distresses for rent reserved by lease, to the end that A. might be fully paid and satisfied the interest and costs. B. gave due notice that he would require the purchase-money to

¹ *Doe v. Smith*, 1 Marsh. 359. 3 Taunt. 795.

remain a charge on the premises for five years: he was let into possession and received the rents, and in July, 1828, became bankrupt; and half-a-year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress. On the 16th October, 1828, after the bankrupt had obtained his certificate, another half-year's interest became due, and an action of covenant was brought against the bankrupt to recover the same. He pleaded the bankruptcy generally. Held, that the agreement was substantially an agreement for the purchase of the premises, and that it did not become a lease, or agreement for a lease, by reason of the interest having been in arrear more than thirty days, and of the proviso contained in the agreement; that the unpaid vendor was entitled to have the estate resold, and the produce and interest applied in payment of the purchase-money, and to prove against the estate for the residue; and consequently, that the claim for interest was a debt proveable under the commission, and therefore barred by the certificate.¹

Where two parties exchanged acceptances, and both became bankrupt at a time when all the bills were in circulation—and the assignees of one party, besides paying dividends to the full amount of that party's acceptances, had also paid dividends on account of the acceptances of the other,—the court of King's Bench were equally divided in opinion on the question, whether the assignees could maintain an action to recover such surplus dividends from the other party, notwithstanding his certificate.²

The certificate has been held no discharge to a bankrupt from an action of *assumpsit*, on a promise to pay the plaintiff a weekly sum for the support of the bankrupt's illegitimate child, except as to the arrears accruing *before* the bankruptcy; for the promise was considered to be of such a nature, as not to admit of an aggregate value being set upon it for the purpose of proof; the future arrears, therefore, being not proveable under the commission, were of course not discharged by the certificate.³ So the certificate is no discharge of a bastardy bond, as to the bankrupt's liability for further expenses, incurred by the parish officers subsequently to the bankruptcy;⁴ for this is not like the case of an annuity, which can be set a

¹ *Hope v. Booth*, 1 B. & Adol. 493.

² *Cowley v. Dunlop*, 7 T. R. 565.

³ *Miller v. Whittenbury*, 1 Camp.

⁴ *Overseers of St. Martin in the Fields v. Warren*, 1 B. & A. 491; 1 Star. 188; and see *Davies v. Arnott*, 3 Bing. 154.

value upon, and where an estimate is made only of the duration of life; but, in this case, the expenses for which the party is liable may vary, in consequence of the sickness of the child; and the contingency will be, not only the duration of life, but on the continuance of health, which is subjected to every accident of human life, and the most precarious and uncertain event possible.

It has been held, also, that bankruptcy does not dissolve a contract of a trader with his clerks and servants, and that a clerk hired by the year at a certain salary, may recover his salary for the whole year, or *pro rata*, notwithstanding the bankrupt has obtained his certificate.¹

The certificate, as we have seen,² has no operation until it is confirmed by the court of review; nor has it, when allowed, any relation back to an earlier period. Thus, a legacy (as has been before stated)³, which devolves upon a bankrupt pending a petition to stay the certificate, though the petition was in fact unfounded, and the certificate was afterwards allowed, goes to the assignees; unless, indeed, the petition was presented with the *express object* of delaying the certificate.⁴

So, though the bankrupt's *bail* will be discharged, if he obtains his certificate before they are fixed, yet they will not be discharged, if they are fixed before the certificate is allowed; for in that case a new debt arises, which is their own proper debt, distinct from the original debt of the bankrupt, and therefore not discharged by the discharge of the original debt.⁵ Formerly, where the bankrupt obtained his certificate pending an action against him, before the bail were fixed, the practice was for the bail to surrender the defendant—and then for him to apply to be discharged, upon an affidavit stating the fact of his having become a bankrupt since the cause of action arose, and having since obtained his certificate. But now, where a bankrupt is clearly entitled to his discharge, the courts (or a judge on summons) to avoid circuitry, will order an *exoneretur* to be entered on the bail-piece without the form of a regular surrender.⁶ If the bail do not apply to enter an *exoneretur*

¹ *Thorne v. Williams*, 3 Nev. 12. *tridge*, 14 East, 599. *Stapleton v. M. 545.* But see ante, Ch. ix. *Macbar*, 7 Taunt. 589.

² Ante, 632.

³ Ante, 421.

⁴ Ex parte *Ansell*, 19 Ves. 208.

⁵ *Woolley v. Cobbe*, 1 Burr. 244.

Cockerill v. Ouston, ib. 436. *Walker v. Giblett*, Bl. 811. *Mannin v. Par-*

tridge, 14 East, 599. *Stapleton v. Macbar*, 7 Taunt. 589.

⁶ *Palmby v. Masters*, Barnes, 368.

Martin v. O'Hara, Cowp. 823.

1 Tidd. Pract. 280. *Todd v. Max-*

field, 3 B. & C. 222; and see post,

"Of Pleading the Certificate." But

see *Humphrey v. Knight*, 6 Bing.

569.

till after the money is levied upon them, they can only be relieved upon payment of costs.¹ And the courts will not wholly exonerate the bail, without giving the plaintiff in the action an opportunity of trying by an issue, whether the certificate was fairly obtained;² but they will not grant an issue to try the fact of the bankrupt being a *trader*; for the certificate itself is, by the statute,³ made evidence of the trading.⁴ In the case of a foreign certificate, however, they will direct an issue to ascertain the circumstances under which the debt was contracted, from which the bail contend to be discharged.⁵ The proper mode for the bail to avail themselves of the certificate of their principal, when they are sued upon their recognizance, is not to plead such certificate in their discharge, but to apply for relief to the summary jurisdiction of the court.⁶ Bail in *error* are not entitled to relief, although the bankrupt obtains his certificate pending the writ of error; for bail in error cannot (like bail to the action) surrender their principal in discharge of their liability.⁷ Neither are bail of any description discharged by the bankrupt's certificate under a *second commission*, where he has not obtained his certificate under the first; for as a second commission against an uncertificated bankrupt is void, a certificate under such a commission will not entitle the bankrupt to be discharged, and the bail can never be in a better situation than the principal.⁸

Where a bankrupt has obtained his certificate, he is competent to justify as bail in an action; his recent bankruptcy being not of itself an objection to his so doing.⁹

The effect of a certificate under an English commission of bankrupt, upon a debt contracted in a *foreign* country—and the effect also given here to a *foreign* certificate, with respect to a debt contracted either abroad, or in England—are questions of a very complicated nature, and involve many considerations of international law, which it is far beyond the scope of the present treatise to discuss in the manner due to the importance of the subject. The cases, which are to be met with in the books, principally relate

¹ *Mannin v. Partridge*, *supra*.

² *Woolcot v. Leicester*, 6 Taunt.

75.

³ 6 Geo. 4, c. 16, s. 126.

⁴ *Harmer v. Hagger*, 1 B. & A.

332.

⁵ *Bamfield v. Anderson*, 5 Moore, 331; and see post.

⁶ *Donnelly v. Dunn*, 2 Bos. & P.

45. *Beddome v. Holbrooke*, 1 Bos. & P. 450, note (b).

⁷ *Southcote v. Braithwaite*, 1 T. R. 624.

⁸ *Martin v. O'Hara*, Cowp. 823.

⁹ *Smith v. Roberts*, 1 Chitt. Rep. 9.

to the operation of a *foreign certificate* in *this country*—instead of the effect produced by an *English certificate* upon a *foreign debt*—this last question, however, being one that is more immediately connected with the object of the present work.

A certificate obtained under an *English* commission of bankrupt, as it now discharges the bankrupt from all claims and demands made proveable under the commission,¹ will operate (as it should seem) in *this country* at least, to discharge any debt contracted abroad—provided the debt was a proveable debt, and the foreign creditor had an *opportunity* of proving it under the commission. And upon this principle, it is said to have been determined by the court of session in *Scotland*, that a certificate under an *English* commission would be a discharge *there* of every debt that could be proved under the commission, whether *English* or *Scotch*.² It is said, however, in some of the books, that a certificate under a commission in England will not bar a debt contracted in the West Indies,³ on the authority of an opinion given by Lord Talbot, when at the bar, to this purport: viz. that notwithstanding the effects of the bankrupt in the colonies are liable to a commission here, and the right is vested in the assignees—and though it might seem reasonable that his certificate should be equally extensive,—yet, as the bankrupt laws of England were made since the West Indian colonies were settled, and therefore did not extend to them unless they were expressly named,—he was of opinion that a certificate, though confirmed here, would be no discharge to the bankrupt, if a suit was commenced against him in Barbadoes. But in a case, decided at the cockpit, upon an appeal from the colonial court of Demerara, it was determined (consistently as it seems with the above decision by the court of session in Scotland,) that a certificate under an *English* commission, where the creditor had *full notice* of the commission, was a bar to a suit instituted in the colonial court for the recovery of a debt—the consideration for which debt was goods consigned by

¹ Section 121.

² *Bank of Scotland v. Cuthbert*, 1 Rose, 486; and see Cullen, 398. According to Mr. Bell, however, (Bell Com. 693, n.) the bills of exchange in this case being accepted by the drawees in England, the debt was considered as an *English*

debt (and see post). The point decided, too, is said to be still *sub judice*, though the decision took place so long ago as January, 1813. Eden's B. L. 396.

³ Beawes Lex. Mer. 4th ed. 543. Davis B. L. 439. C. B. L. 500.

the plaintiff from Demerara to the defendant and his partner in London, for which the latter had accepted bills before their bankruptcy, having also engaged by letter to accept others, which were not presented till after the bankruptcy.¹ And it has been since decided by the court of the Privy Council, that the certificate was an equal bar to an action for a debt contracted by the bankrupt at Calcutta, although the creditor there had *no notice* of the commission.² And, indeed, it seems but just (as Lord Talbot admitted in his opinion above cited) that the effect of the *certificate* should be co-extensive with the *assignment*; for, if foreign courts allow the assignees under an English commission to strip the bankrupt of his foreign property, by giving effect to the *assignment* in their jurisdiction, they ought with equal reason to give effect to the *certificate*, and not leave the bankrupt liable to the actions of the foreign creditors.³

With respect to the operation of a *foreign certificate* in this country, the English courts are guided by the question, *where the debt was contracted*, which the foreign certificate is set up to bar. If it was contracted in the *same country* where the discharge took place, the law of that country is held to prevail, and the debt, therefore, becomes extinguished;⁴ and this, as Lord Mansfield said, upon the general principle, that where there is a discharge of a debt by the law of one country, it will be a discharge in every other; and he added, that he remembered a case in Chancery of a *cessio bonorum* in Holland, which being a discharge in that country, was held to have the same effect here.⁵

It becomes, therefore, important to consider in the course

¹ *Odwin v. Forbes*, Buck, 57.

² *Edwards v. Ronald*, 1 Knapp's Rep. 259.

³ Mr. Eden thinks, that the only true ground upon which this case can be supported is, that by the Dutch law (according to which the court professed to proceed) all foreign debts are barred by a Dutch discharge; and that, as the debt was in this instance a *colonial*, and not an *English* debt, the decision was, upon the general reasoning given in the judgment, quite untenable. But though the principle of reciprocity and mutual comity formed, certainly, one of the grounds for the judgment in that case, it is not so clear that the debt was

considered to be a *colonial* debt, according even to the principle of *Watson v. Renton* (one of the cases cited by Mr. Eden from Bell's Commentaries on the Laws of Scotland, see post); for though the consideration for the debt was the goods sent from Demerara, the *debt itself*, in virtue of the *acceptance* of the bills, might be said to have been contracted in England.

⁴ *Burrows v. Jemino*, Str. 732. 2 Eq. Ab. 524. Moseley, 1. *Ballantine v. Golding*, C. B. L. 464, 499. *Potter v. Brown*, 5 East, 124. *Quelin v. Maisson*, 1 Knapp, 266.

⁵ The *cessio bonorum* in Holland, however, seems (like the same proceeding among the Romans) to be

of this inquiry, under what particular circumstances a debt will be held to be *contracted* in a particular country. In the case before Lord Mansfield, the demand arose upon a bill of exchange *drawn* in *Ireland*, and *payable* by the defendant, who resided in *Ireland*, and who had obtained a *certificate* under an *Irish commission*; this, therefore, was decidedly a foreign debt discharged by a foreign certificate. The general principle indeed (in the case of a debt arising on a bill of exchange) seems to be, that the country where the bill is *accepted and paid*, is the country where the debt is *contracted*. Thus, a bill of exchange, (though drawn by the defendant in *Ireland*,) which was *accepted and paid* by the plaintiffs in *England*, was determined by the court of King's Bench to be an *English* debt, and therefore not discharged by a certificate under an *Irish commission*.¹ And in like manner, the Scotch courts have holden, that bills accepted by the drawees in *England* constituted an *English* debt;² and even that a bill drawn from *New York* upon *Greenock*, which was not accepted, was a Scotch debt, and consequently not discharged by the bankrupt's certificate in *New York*.³ So, where goods were consigned by a merchant in *Scotland* to one in *England*,—and a bill, payable at *Berwick*, was given for part of the goods,—the *bill*, in this case, was held by the Scotch courts to be an *English* debt,—while the general balance of the same debt, resting on the contract of sale, was considered as Scotch.⁴

The result deducible from all these cases seems to be, that a *foreign certificate* is no bar to an action in *England* for an *English* debt; nor is an *English certificate* considered in *Scotland* a discharge of a debt wholly contracted there; for the courts of both countries appear to agree in their decision (at least with respect to bills of exchange) as to the circumstances under which the debt is to be considered a *foreign*, or a *home-contracted* debt. And the reasoning of Lord Kenyon, in giving judgment upon a point of this description, appears to be quite unanswerable; for it is impossible (as he observed) to hold, that a contract made in one country is to be governed by the laws of another: and

a discharge of the person only, and not of the effects, except as to some few trifles of wearing apparel, &c. See Voet on the Pandects, tom. ii. lib. 42, tit. 3, and Lord Hardwicke's judgment in *ex parte Burton*, 1 Atk. 255.

¹ *Lewis v. Owen*, 4 B. & A. 654.

² *Bank of Scotland v. Cuthbert*, 1 Rose, 462; and see 2 Bell Com. 693 a.

³ *Armour v. Campbell*, cit. *ibid*. 8 Fac. Coll. 417.

⁴ *Watson v. Renton*, 2 Bell Com. 693.

he puts the case (as that was) of a contract lawfully made by a subject in this country, which he resorts to an English court of justice to enforce,—and the only answer given is, that a law has been made in a foreign country to discharge the defendants from their debts, on condition of their relinquishing all their property to their creditors. “But (he adds) how is that an answer to a subject of this country suing on a lawful contract made here? How can it be pretended that he is bound by a condition, to which he has given no assent, either express¹ or implied?” Nor does it make any difference, that the creditor in this country had taken proceedings in the foreign court to oppose the discharge of the debtor.²

A discharge, however, under a sequestration in Scotland issued against a trader residing there, in conformity to the provisions of the Scotch bankrupt act (the 54 Geo. 3, c. 137,) has been held to be a bar to an action against the trader here, on a debt contracted in England, in like manner as it is a bar to debts contracted in Scotland.³ This decision, however, was expressly founded upon the effect of that particular statute, and not upon any general principle.⁴

When a foreign certificate is set up in discharge of an action in this country, the courts think it a point of too much importance to be decided in a summary way;⁵ they will, therefore, refuse an application for an *exoneretur* to be entered on the bail-piece, on the ground of the defendant's discharge in the foreign country,—and will direct an issue, in order to ascertain the circumstances under which the original debt was contracted.⁶

Where an execution was levied against the goods of a bankrupt, for a debt which existed previous to the bankruptcy,—and previous to the execution of the writ, the bankrupt's certificate was signed by sufficient in number and value of the creditors, but it was not allowed by the lord chancellor until after the writ was executed,—the execution was held, under these circumstances, to be valid.⁷ Mr. Cooke, however, adds a quære to this case, whether the

¹ *Smith v. Buchanan*, 1 East, 6; and see *Quin v. Keefe*, 2 H. B. 553. *Shallcross v. Dysart*, 2 G. & J. 87.

² *Phillips v. Allan*, 8 B. & C. 477.

³ *Sideway v. Hay*, 3 B. & C. 12.

⁴ *Ibid.* 23; and see *Geddes v. Mowat*, 1 G. & J. 414.

⁵ *Pedder v. Macmaster*, 8 T. R. 610.

⁶ *Bamfield v. Anderson*, 5 Moore, 331. *Quin v. Keefe*, 2 H. B. 553.

⁷ 3 Moore, 244. *Whittingham v. De la Riese*, 2 Chit. Rep. 53. *Earlier v. Languishe*, *ibid.* 55.

⁷ *Callen v. Meyrick*, 1 T. R. 361.

goods could legally be considered as the *bankrupt's*, the property of an uncertificated bankrupt belonging to his assignees. But it seems to be now clearly settled, that although property acquired by an uncertificated bankrupt *may* be taken from him by his assignees, yet it does not *absolutely vest* in them; and if they make no claim to it, the bankrupt has a right to retain it against all other persons.¹

And where the execution was levied on the *same day* that the certificate was allowed, the court of Common Pleas refused the bankrupt relief on *motion*; and they doubted whether the 121st section extended to the *property* as well as the *person* of the bankrupt.² But this doubt has been entirely removed by a subsequent decision of the King's Bench, where it was held that the 121st section clearly applies to all debts proveable under the commission, and to all remedies for the recovery of the debt.³

The certificate discharges the bankrupt from all debts, whether joint or separate—and whether the commission, under which it is obtained, is a joint or separate commission; for the debts, which a man owes *jointly* with another, are in law as much his own debts as those which he owes on his *separate* account.⁴

Where an annuity was granted for a sum paid as a consideration, and the grantor became bankrupt—and afterwards the annuity was set aside,—the certificate was held a bar in an action against the grantor for money had and received—on the ground, that the annuity having been set aside, was to be considered as if it had never existed—and that the relation took place to the time when the money was paid, the plaintiff's title to the money accruing from⁵ that time.

Where the bankrupt has been already discharged by a certificate under any former commission, or has previously *compounded* with his creditors, or been discharged by any insolvent act, it is declared by 6 Geo. 4, c. 16, s. 127,⁶ that the certificate will only protect his *person* from arrest, unless his estate (after all charges) shall produce sufficient to pay every creditor under the commission 15s. in the pound; and his future estate and effects (except his tools of trade and

¹ *Drayton v. Dale*, 2 B. & C. 293; and see ante, 611.

² *Hanson v. Blakey*, 4 Bing. 493.

³ *Davis v. Shapley*, 1 B. & Adol. 54.

⁴ Ex parte *Yale*, 3 P. Wms. 25, note (A.) *Horsey's* case, *ibid.* 23. *Twiss v. Massey*, 1 Atk. 67. *Wicks*

v. Strahan, 2 Str. 1157. *Howard v. Poole*, *ibid.* 995. *Grace v. Higham*, *Fitz.* 281.

⁵ *Walker v. Liscarry*, 6 Esp. 98.

⁶ The above section has been held to operate retrospectively. *Young v. Rishworth*, 3 Nev. & P. 585. 8 Ad. & E. 470.

necessary household furniture, and the wearing apparel of himself, his wife and children,) will now vest in the assignees under the second commission, who will be entitled to seize the same, as they might have seized property of which he was possessed at the issuing of the commission.

With respect to that part of the above clause which relates to a *previous bankruptcy*, it will be seen, that the provision (as to the liability of the bankrupt's future effects) is very different from the construction put, in most of the cases hitherto decided, upon the 5 Geo. 2, c. 30, s. 9,—by which construction *any creditor*, though he had even signed the certificate under the second commission, was (before the 49 Geo. 3, c. 121, s. 14,) enabled to bring an action against the bankrupt, and recover against his future effects.¹ The clause in the *new act* does not say that the future estate and effects shall be liable to the *creditors generally*, but declares expressly, that they shall *vest in the assignees* under the second commission, unless 15s. in the pound is paid; so that—independently of the construction of the 59th section of the 6 Geo. 4, c. 16, (which is taken from the 4th section of the 49 Geo. 3, c. 121,) by which the proving a debt under a commission is declared to be deemed an *election* by the creditor to take the benefit of the commission, with respect to the debt so proved²—no individual creditor, who has even not proved his debt, can now with any effect (as he could under the 5 Geo. 2,) sue the bankrupt after he has obtained his certificate; for his *person* is protected by his certificate; and an execution would be of no avail against his *effects*, which are declared by the statute to be *vested* in the assignees.³ The only remedy, therefore, to render such future effects available, is the power given to the assignees in the latter part of the above section, enabling them to seize the effects in the same manner as they may seize his other property at the issuing of the commission. All the cases, however, as to this point, which have been decided upon questions between the bankrupt and the *creditors generally*, will still be applicable to future questions between the bankrupt and the *assignees* under the second commission.⁴

¹ *Philpott v. Corden*, 5 T. R. 287. *Gill v. Scrivens*, 7 T. R. 27. *Jelfs v. Ballard*, 1 Bos. 467. *Edmonson v. Parker*, 3 Bos. & P. 185. *Coverly v. Morley*, 16 East, 225. *Horil v. Browning*, 7 East, 159. *Ex parte Baker*, 1 Rose, 452. *Ex parte Hodgkinson*, 2 Rose, 172. 19 Ves. 291.

² *Read v. Sowerby*, 3 M. & S. 78.

³ And see *Robertson v. Score*, 2 B. & Ad. 338.

⁴ It seems that a different construction from that laid down in *Horil v. Browning*, and the subsequent cases, was formerly put upon

A certificate under a second commission, (although the first commission has been even *superseded* with the consent of the creditors,) it has been held, will not protect a bankrupt's future effects, unless 15s. in the pound are paid under the second commission;¹ for the question is, as Lord Mansfield put it, whether a *supersedeas* can make a thing not to have been done, which in fact has been done, namely, the bankrupt's discharge under the first commission; and even if the first bankruptcy was to be considered as never having existed, yet if the creditors have accepted a dividend under the first commission in lieu of their whole debt, they, at any rate, would then be taken to have *compounded* for their debts within the meaning of the statute.²

And if a bankrupt has not obtained his certificate under the first commission, a certificate under the second commission will not even protect his person.³ And the same where a third commission issued, and the bankrupt had paid no dividend under the first or second commission, notwithstanding he had obtained his certificate under each of those commissions.⁴

Where a defendant in an action gave the plaintiff a *cognovit* for the amount of the damages—and two years afterwards a second commission of bankrupt issued against the defendant, under which he obtained his certificate, but *no dividend had been declared*—and the plaintiff afterwards entered up judgment, and took out execution;—upon a motion to set it aside, on the ground of the *cognovit* being discharged by the subsequent bankruptcy and certificate, the court refused the motion, saying, that a *cognovit* is a mere acknowledgment of the amount of the damages—and that where a man acknowledges the cause of action, the plaintiff may sign judgment at any time.⁵

As to the form of pleading, and the evidence necessary to defeat a certificate under a second commission, see *post*.

With respect to a certificate under a *third* commission, it has been held, that though the bankrupt had not paid 15s. in

the 9th section of the 5 Geo. 2, c. 30, (*Ashley v. Hill*, 2 Christ. 329. Davies, 515;) by which it was held, that the future estate of the bankrupt actually vested in the assignees under the second commission, if he did not pay 15s. in the pound. And this construction, Mr. Eden thinks, ought to have prevailed in *Hovil v. Browning*, instead of holding, that any individual creditor might sue

the bankrupt under the second commission.—Eden, 394.

¹ *Thornton v. Dallas*, Doug. 46.

² 1 Doug. 48.

³ *Till v. Wilson*, 7 B. & C. 684.

⁴ *Fowler v. Coster*, 10 B. & C. 427. See *Eicher v. Noble*, 1 Mood. & M. 303, as to the bankruptcy being a bar to a creditor suing, though 15s. in the pound has not been paid.

⁵ *Wyborne v. Ross*, 2 Taunt. 68.

the pound under the second, the certificate was not void, but voidable only by application to the lord chancellor.¹ For a certificate is valid, as long as the commission under which it is obtained continues in force—unless, indeed, in those cases where the statute says that the certificate shall be absolutely void.²

But this is now held differently under the 127th section of the 6 Geo. 4, c. 16, for a third commission, where 15s. in the pound has not been paid under the second, is decided to be void, there being legally nothing upon which the third commission can operate, all the property of the bankrupt being expressly vested in the assignees under the second commission.³

In that part of the above clause which relates to the *compounding* with creditors, such a composition only is contemplated as is *general*, and is calculated to admit *all creditors of every description*. Therefore, where a deed of composition was framed only for the *joint* creditors of two bankrupts, and not signed or accepted by the *separate* creditors of one of the bankrupts, it was held not such a compounding as would prevent the certificate from extending to the protection of the future *property* of the bankrupt, as well as of his person.⁴ But, if the terms of the deed embrace *all* the creditors, although some of them do not come in, and afterwards sue the bankrupt, and are paid,—*that* has been held to be such a compounding as will deprive the bankrupt of the benefit of his certificate, with regard to the protection of his future effects.⁵ It is a question, however, when a bankrupt (who has previously compounded with his creditors) pays those creditors before his bankruptcy the *full amount* of their debts, whether his future estate and effects are to remain liable, unless his estate under the commission shall produce 15s. in the pound. The above provision in the statute makes no distinction, whether the creditors, with whom the bankrupt has compounded, are afterwards satisfied or not. And it may be argued, that such a case is within the mischief contemplated by the act; for the bankrupt will have had all the benefit (for a certain time at least) of a composition, till he could satisfy his creditors the full amount of their debts; and, in the interim, the creditors will have sustained some damage by the delay. The crime,

¹ *Todd v. Maxfield*, 3 B. & C. 222.

² *Ibid.*

³ *Fowler v. Coster*, 10 B. & C.

427.

⁴ *Norton v. Shakespear*, 15 East,

619.

⁵ *Slaughter v. Cheyne*, 1 M. & S.

182.

therefore, (if it may be so called) of non-payment will be complete at one time, and the subsequent payment in full may have been the very cause of his bankruptcy.¹ On the other hand it may be contended, that the term "compounding with his creditors" is intended by the statute to imply simply a composition as to the *amount* of his debts—that is, accepting a part in satisfaction of the whole; and that when the debts are actually paid *in full*, the agreement of the creditors to give the bankrupt merely *time* for payment, cannot be said to come within the meaning of the word *composition*.

An uncertificated bankrupt is not entitled to his discharge under the insolvent act, unless he has been in custody for the space of three years.²

Where, after the bankruptcy of one partner, the other was obliged to pay a partnership debt, which he had before the bankruptcy furnished the bankrupt partner with money for the express purpose of discharging,—who, instead of doing so, misapplied the money,—this was considered to be such a case of *fraud* as prevented the certificate from operating as a bar to an action by the solvent partner, for the bankrupt's proportion of the debt paid subsequent to the bankruptcy.³ But, as such a debt *may be proved* now under the 52nd section of the new act, it is a question, whether he would not be discharged by his certificate; for, notwithstanding the fraudulent misapplication of the money by the bankrupt, it does not seem to come within those exceptions enumerated in the act, which render the certificate void.

The certificate does not estop the bankrupt from disputing the validity of the commission against a *stranger* to it, between whom and the bankrupt there is, consequently, no reciprocity. Therefore, in an action of trover brought against a stranger to the commission by a bankrupt, who had obtained his certificate under a joint commission issued against himself and others, he was held to be not prevented from taking advantage of its illegality.⁴

The certificate, indeed, is (by 6 Geo. 4, c. 16, s. 127,) only made evidence of the fact of issuing the commission, &c., leaving untouched the question of the validity of the effect of the commission.⁵

¹ See the argument of Mr. J. Holroyd (then at the bar) in the case of *Read v. Sowerby*, 3 M. & S. 79.

² *Wright v. Hunter*, 1 East, 20.

³ *Butts v. Bilke*, 4 Pri. 240.

⁴ *Fowler v. Coster*, 10 B. & C. 430.

⁵ 7 Geo. 4, c. 57.

It has been before stated,¹ that where the bankrupt is assignee of another bankrupt's estate, and is indebted to that estate in respect of money retained or employed by him to the amount of 100*l.*, the certificate will only have the effect of freeing his *person* from arrest; but his future *effects* will remain liable for so much of his debt to the estate of which he is assignee, as shall not be paid by dividends under his commission, together with interest for the whole debt.²

The certificate, also, (as has been already mentioned)³ will have no effect, unless it is entered of record at the bankrupt office, and has a memorandum of such entry indorsed on it by the proper officer, pursuant to the directions of the 95th and 96th sections of the new act. But, though a certificate is not obtained by a bankrupt until after the new act began to take effect, (*viz.*, the 1st September, 1825,) yet if the commission issued *before*, the certificate need not be⁴ registered.

SECTION V.

Of Pleading the Certificate; and herein of the Evidence to support it, or defeat it.

By 5 & 6 Vict. c. 122, s. 42,⁵ any bankrupt who shall, after his certificate is confirmed, be arrested, or have any action brought against him for any *debt, claim, or demand, proveable under the fiat*,⁶ may be discharged upon entering an appearance; and may plead in general, that the cause of action accrued before he became bankrupt, and give the act and the special matter in evidence; and such certificate and the confirmation thereof will be sufficient evidence of trading, bankruptcy, fiat, and other proceedings precedent to the obtaining such certificate.⁷

As the statute provides for the *particular form* of the plea, *viz.*, that the cause of action accrued before the defendant became bankrupt,—he cannot, therefore, give his bank-

¹ Ante, 365.

² 6 Geo. 4, c. 16, ss. 104, 105.

³ Ante, 632.

⁴ *Tattle v. Grimwood*, 3 Bing. 493.

⁵ Taken from 5 Geo. 2, c. 30, ss. 7, 13.

⁶ The words in italics are intro-

duced instead of the words, "any debt due before such time as he became bankrupt," which were in the 5 Geo. 2, c. 30, s. 7.

⁷ In the 5 Geo. 2, c. 30, s. 7, it was provided, that if a verdict passed for the defendant, he was to recover full costs.

ruptcy in evidence under the *general issue*.¹ Neither can he plead specially in an action of covenant, "that before the action he became bankrupt, and that the said indenture was made before he became bankrupt;" for he must comply strictly with the form of the plea prescribed by the statute,² and the plea must conclude *to the country*.³ But it is not necessary to aver that the bankruptcy happened before the commencement of the suit.⁴ And though the certificate is allowed *after* the commencement of the action, yet if it is *before* the plea is pleaded, it will be evidence to support the general plea given by the statute.⁵

It is said to have been ruled by Lord Kenyon, that a certificate granted *after* plea pleaded, though before trial, was not available at law.⁶ But it seems to be settled, that it may be pleaded *puis darrein continuance* at any time before judgment;⁷ and though the bankrupt omits to plead it *puis darrein continuance*, this omission will not prevent his right to be discharged after tender by his bail.⁸ And an affidavit verifying the plea *to the best of the deponent's knowledge and belief*, has been held a sufficient affidavit to accompany the plea under the 4 Ann. c. 16, s. 11.⁹ Thus, where an uncertificated bankrupt had pleaded a judgment recovered—and upon an issue of *nul tiel record*, the plaintiff ruled him to produce the record on the 25th of April—and the bankrupt (who had obtained his certificate on the 14th of April) on the morning of the 25th moved for leave to plead the allowance of the certificate *puis darrein continuance*,—the court in this case allowed the plea.¹⁰ And where an action, which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea of the defendant's bankruptcy and certificate *puis darrein continuance* was held to be admissible, though the certificate was obtained since the term, and though, if the cause had been tried when it was first brought on, the plaintiff would have had judgment and execution before

¹ *Gowland v. Warren*, 1 Camp. 363.

² *Charlton v. King*, 4 T. R. 156.

³ *Sheen v. Garrett*, 6 Bing. 686.

⁴ *Tower v. Cameron*, 6 East, 413.

⁵ *Harris v. James*, 9 East, 82. *Quære*, Whether the wording of the new act, section 126, (in which the words, "after his certificate shall have been allowed," are used—instead of the general word "after-

wards," in the 5 Geo. 3, c. 30, ss. 7, 13,) will not make a difference in this respect.

⁶ *Longmead v. Beard*, cit. 9 East, 85.

⁷ *Todd v. Maxfield*, 6 B. & C. 105.

⁸ *Humphreys v. Knight*, 6 Bing. 572.

⁹ *Sharps v. Witham*, 1 McClell. & Y. 350.

¹⁰ *Ibid*.

the certificate.¹ And though the certificate be not obtained till after judgment, when it is too late to plead it,² it is still available for the bankrupt's discharge out of execution for the debt and costs.³

It is a good answer to a plea of bankruptcy and certificate, that the certificate was obtained by fraud, although the enactment to that effect in the 5 Geo. 2, c. 30, s. 7, is not repeated in the 6 Geo. 4, c. 16.⁴

The plea of bankruptcy does not require the signature of counsel in the King's Bench;⁵ but in the Common Pleas a serjeant's signature is necessary to it.⁶ The plea must be *delivered*, and not filed.⁷

It was once held, that the defendant must aver in his plea, "that he has conformed according to the statutes concerning bankrupt;"⁸ but this case was afterwards denied to be law; for, if the defendant has *not* conformed, it is matter of evidence,⁹ and the statute having directed a general form of pleading the bankruptcy, it seems sufficient to follow the words of the statute.

As to pleading the certificate in equity, it has been held, that if the demand of a plaintiff in equity against a bankrupt is in the nature of an action at law for a *tort*, the bill may be demurred to; but if it is in the nature of an action of *assumpsit*, the defendant may plead his bankruptcy and certificate.¹⁰

If a bankrupt is sued by his surety, or other person, who was liable for his debts at the time the commission issued against him, (though the surety may have become such after the act of bankruptcy, and pays the debt after the issuing of the commission,) the bankrupt must plead his bankruptcy and certificate, if he means to avail himself of it.¹¹ In such a case it has lately been decided (with reference to the 8th section of the 49 Geo. 3, c. 121), that the general plea of bankruptcy was sufficient without pleading the bankruptcy¹² specially—the obvious meaning of that section being, in the words of Lord C. J. Abbott, that the bankrupt should have

¹ *Whitmore v. Bantock*, 1 M. & M. 122.

² *Todd v. Maxfield*, *supra*.

³ Per Lord Ellenborough, *Harris v. James*, 9 East, 92; and see 6 Geo. 4, c. 16, s. 126.

⁴ *Horne v. Ion*, 4 B. & Ad. 78.

⁵ *Leigh v. Monteiro*, 6 T. R. 496.

⁶ *Pitcher v. Martin*, 3 Bos. & P. 171.

⁷ *Henderson v. Samson*, 2 B. & A. 392.

⁸ *Paris v. Salkeld*, 2 Wils. 139.

⁹ *Willan v. Geordini*, 1 C. B. L. 518.

¹⁰ *De Tastet v. Walker*, Buck, 153.

¹¹ *Stedman v. Martimont*, 12 East, 664. 13 East, 427.

¹² *Westcott v. Hodges*, 5 B. & A. 12.

the same benefit of a precise form of pleading, as if the debt had arisen before the bankruptcy; and that a payment made by the *surety after* the bankruptcy, placed the party in the same situation as if the payment had been made *before* the bankruptcy by any *other* person.¹ This decision, however, was founded on the peculiar wording of the latter part of the 8th section of the 49 Geo. 3, (which is omitted in the parallel section, the 52nd, of the new statute,) as well as upon the circumstance of no decision having been cited to show that the general form would not do. But a case might have been cited, in which it was held by Lord Mansfield, that when a promissory note was *made before*, but was not payable until *after* the bankruptcy, a plea that the debt was due at the time of the bankruptcy was bad in point of form.² It may therefore still be advisable, in such a case, to plead the bankruptcy more specially than in the general form given by the statute.³

The general plea, as given by the statute, puts the whole merits of the question in evidence on both sides; and, therefore, in an action on a bond to which bankruptcy is pleaded, the plaintiff will be allowed to give the *consideration* of the bond in evidence, to show that he is not barred by the certificate.⁴ So, the plaintiff will be at liberty to give evidence of gaming by the bankrupt, in order to vitiate the certificate; but he must confine his evidence to *one* day, if he relies upon the bankrupt having lost 20*l.*; and he must also elect, whether he will give evidence of one loss amounting to 20*l.* in one day, or of several losses in the year amounting to 200*l.*⁵ And, generally, all facts, which the plaintiff relies on as vacating the certificate, may be given in evidence on the *similiter* to the defendant's plea;⁶ for (the plea of bankruptcy and certificate *concluding to the country*) a replication of any new fact (which according to the rules of pleading must *conclude with a verification*) would be bad on special demurrer.⁷

Where the defendant, upon a plea of bankruptcy, put in a certificate under a commission issued against him by a different name from that which he was commonly known

¹ *Westcott v. Hodges*, 5 B. & A. 17. see *ex parte Kennet*, 1 Ves. & B. 193. 1 Rose, 331.

² *Trueman v. Fenion*, Cowp. 544. ⁵ *Hughes v. Morley*, 1 Holt, 520.

³ See *Wood v. Dodgson*, 2 M. & S. 196. ⁶ S. C. 1 B. & A. 22.

⁴ *Alsop v. Price*, Doug. 155; and ⁷ *Wilson v. Kemp*, 2 M. & S. 549; and see *Miles v. Williams*, 1 P. Wms. 258.

by,—upon its being objected that the certificate was a nullity, Lord Ellenborough ruled, that the objection might be a good ground for applying to the lord chancellor to supersede the commission—but that if it really did issue against *the defendant*, while it remained in force, he must give effect to the certificate; but he required evidence, that the defendant was once called by the name mentioned in the commission.¹

A certificate obtained in a *foreign* country should be *specially* pleaded, setting forth all the proceedings under the bankruptcy; for where, under a bankruptcy in *Ireland*, there was a general plea of the bankruptcy and certificate, referring to the *Irish* statute, and concluding to the *country* in the same manner as the plea allowed with respect to *English* bankrupts, it was held bad.²

On the trial of a plea of bankruptcy, the time of the issuing of the commission is presumptively proved to be on the day of the date of the commission, as it appears in the certificate—and the time of the act of bankruptcy, upon which the commission issued, is also presumptively proved by the statement of it in the proceedings under the commission.³ It was held by Lord Kenyon, that the plaintiff was precluded from going into any evidence to impeach the *commission*, and that it must be confined to the *certificate* only; but that, if the petitioning creditor signed the certificate, evidence might then be admitted of his debt being of such a description as would render the certificate null and void, though it might have the effect of impeaching the commission itself.⁴

In an action brought against a bankrupt by an executor, though the defendant obtains a verdict upon a plea of bankruptcy and certificate, the plaintiff is in this case no more liable to costs, than when suing as executor in any other action; for the general statutes giving costs to defendants are held not to extend to executors and administrators.⁵

When a bankrupt pleads his certificate under a *second commission*,—the production of the *first* commission and the proceedings under it, with proof that the bankrupt submitted to it, is sufficient evidence against him of his having been a bankrupt under the first commission.⁶ And the *onus* then

¹ *Stevens v. Elsie*, 3 Camp. 256.

² *Quin v. Keefe*, 2 H. B. 553.

For a form of a plea of a foreign certificate, see *Potter v. Brown*, 5 East, 124.

³ *Pearson v. Fletcher*, 5 Esp. 90.

⁴ *Bateson v. Hartsink*, 4 Esp. 43.

⁵ *Martin v. Norfolk*, 1 H. B. 528.

⁶ *Haviland v. Cook*, 5 T. R. 655.

lies on the bankrupt to prove that his estate has *actually* paid 15s. in the pound under the second commission; ¹ for mere proof of the probability of this is not sufficient.² When, indeed, under the former law, a judgment creditor had recourse to a *scire facias* against a certificated bankrupt under a second commission, in order to obtain execution against his effects, the plaintiff was obliged to aver, that the bankrupt's estate had not paid 15s. in the pound—because, in a *scire facias*, the plaintiff must state everything that entitles him to recover ³—though it seems that the plaintiff was not bound to prove that negative.⁴ If the bankrupt has not obtained his certificate under the first commission, the second commission is a nullity; and therefore a certificate under the second commission will be no discharge.⁵

Where, on the defendant's pleading his bankruptcy, issue is joined on the fact, whether he has been discharged or not under a *former* commission,—the plaintiff must show that the defendant obtained his certificate under that commission, either by the regular proof of it, or by secondary evidence after notice to produce it. The defendant's affidavit of conformity under the first commission would be good *secondary* evidence, if (after notice) he failed to produce the certificate; but it would be insufficient without such notice.⁶ If, however, after notice to produce the former certificate, the defendant does not produce it,—it is sufficient evidence of the allowance of it by the lord chancellor, if witnesses state that they were employed by the bankrupt to solicit the certificate—and that, looking at their books, they have no doubt it was allowed⁷ by the lord chancellor. But the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of the certificate, is not secondary evidence of the allowance, in the absence of the clerk who made the entry.⁸

Where judgment was obtained against a defendant, who had omitted to plead his bankruptcy through the neglect of his attorney—and it was a fair case on the part of the defendant,—the court of Common Pleas set aside the judgment, in order to let in the plea of bankruptcy, observing, that it would be cruel to charge the bankrupt for such neglect.⁹

¹ *Jelfs v. Ballard*, 1 Bos. & P. 467. *Edmonson v. Packer*, 3 Bos. & P. 187. *Gregory v. Merton*, 3 Esp. 195.

² *Coverly v. Morley*, 16 East, 225.

³ *Gill v. Scrivens*, 7 T. R. 27.

⁴ Per Lord Alvanley, 3 Bos. & P. 187.

⁵ *Till v. Wilson*, 7 B. & C. 684.

⁶ *Graham v. Grill*, 4 Camp. 292.

⁷ *Henry v. Leigh*, 3 Camp. 499.

⁸ *Ibid.*

⁹ *Evans v. Gill*, 1 Bos. & P. 52.

But where a bankrupt, after pleading his bankruptcy, neglected to produce his certificate upon the trial, and a verdict was obtained against him,—the court of Chancery would not assist him by granting an injunction.¹

In a case, where the defendant's *bail* became fixed, in consequence of his omitting to plead his bankruptcy, the court of Common Pleas refused to set aside the proceedings against them, saying, that it was the duty of the bail to watch the proceedings against their principal; and that they were in all cases bound, or benefited, by the defence which he makes² to the action. But this case has never been acted upon in the court of King's Bench, where the general rule is, that wherever the bankrupt is entitled to his discharge, the court will relieve the bail, on motion for entering an *exoneretur* on the bail-piece.³ Where the proceedings in an action on the bail-bond were stayed, and the defendant in the original action afterwards pleaded the general issue, and subsequently a plea of bankruptcy *puis darrein continuance*—there being no affidavit that the application to stay the proceedings was made on the part of the bail,—the court of King's Bench set aside the latter plea, and restrained the defendant to his plea of the general issue—on the ground, that when the proceedings were stayed in the action on the bail-bond, it was intended that the defendant should only question the validity of the original debt.⁴ The plea of bankruptcy also is given only to the bankrupt himself: bail, therefore, cannot plead the bankruptcy and certificate of their principal in an action brought against them; but must either apply to the court for summary relief by motion, or proceed by *audita querelâ*.⁵

On the production of the certificate in evidence, the indorsement thereon, purporting to be signed by the proper officer at the bankrupt office, will (without any proof of such signature)⁶ be admissible evidence of the certificate having been duly entered of record, pursuant to the requisitions of the 95th and 96th sections of the new statute.

The *allowance* of the certificate needs no proof; for the judges take judicial notice of the hand-writing of the lord chancellor.

¹ *Lingard v. Hibbertson*, 1 Rose, 460.

² *Clarke v. Hoppe*, 3 Taunt. 46.

³ *Todd v. Maxfield*, 3 B. & C. 222.

⁴ *Dowson v. Levi*, 4 B. & A. 249.

⁵ *Walker v. Giblett*, 2 Bl. 812. *Beddome v. Holbrooke*, 1 Bos. & P. 450.

Donnelly v. Dunn, 1 Bos. & P. 45.

⁶ 6 Geo. 4, c. 16, s. 96; and see post, Chap. xviii. title "Evidence."

And a certificate obtained after the 6 Geo. 4, c. 16, on a commission issued before that statute, is proved by the production of the certificate duly allowed.¹

SECTION VI.

Of Discharging a certificated Bankrupt from proceeding at Law.

By 5 & 6 Vict. c. 122, s. 42, it is provided, that where the bankrupt after the conformation of his certificate is arrested for any debt, claim, or demand, proveable under the fiat, he may be discharged upon entering an appearance. And if he is taken in execution, or detained in prison for such debt, where judgment has been obtained before the conformation of his certificate, any judge of the court wherein the judgment has been obtained may, on the bankrupt producing his certificate, order the officer to discharge him, without exacting any fee. But a bankrupt cannot be discharged until his certificate has been enrolled, pursuant to the 6 Geo. 4, c. 16, s. 96.²

The officer, however, who arrests the bankrupt, has no power to discharge him without the order of a judge; and therefore, where a bankrupt taken in execution produced his certificate to the officer and demanded his discharge, with which the officer complied, the court refused to stay proceedings in an action against the sheriff for an escape.³

The court will not discharge the bankrupt upon common bail, if it appears that the certificate was obtained by fraud⁴—or that the bankrupt has been guilty of any deception⁵—or if the certificate is seriously meant to be disputed⁶—or if a former commission was issued against the bankrupt, under which he never obtained his certificate.⁷ But in a case where an attorney, who had obtained his certificate under a commission, describing him as “a dealer and chapman,” was arrested for a debt payable before the commission issued—though the plaintiff swore that he did not know that the defendant was the person mentioned in the commission, and that he intended to dispute the validity of it on the ground

¹ *Taylor v. Welsford*, 1 Mood. & M. 503.

² *Jacobs v. Phillips*, 4 Tyrr. 652.

³ *Cr. M. & R.* 195.

⁴ *Sherwood v. Benson*, 4 Taunt. 631.

⁵ *Vincent v. Brady*, 2 H. B. 1.

⁶ *Sowley v. Jones*, 2 Bl. 725.

⁷ *Stacey v. Frederici*, 2 Bos. & P. 390. *Nowers v. Colman*, Buck, 5.

⁸ *Till v. Wilson*, 7 B. & C. 684.

of fraud,—the court of Common Pleas nevertheless ordered the bankrupt to be discharged on common bail, as the plaintiff had not stated the *nature* of the fraud, nor *when* he discovered its existence.¹ The courts, however, will sometimes, when they think it necessary, instead of discharging the bankrupt in a summary way, direct the commission to be tried on a feigned issue;² and the same thing also has been done against the bail, where the validity of the certificate has been contested.³

Under the provisions of the 126th section, also, the court has incidentally the power of staying before judgment proceedings against a certificated bankrupt for a debt proveable under his commission.⁴

In cases where execution had been taken out against the goods of a bankrupt, and executed after the allowance of the certificate, it was formerly held, that a judge had no authority to discharge the execution upon motion, and that the bankrupt, to obtain relief, must resort to an *audita querelâ*.⁵ But the modern practice appears to be, for the courts to interpose in a summary way in all cases, where the party would be entitled to relief on an *audita querelâ*;⁶ but in those cases only, where it is quite clear that an *audita querelâ* will lie. Therefore, where a bankrupt obtained his certificate on the 13th November, and the same day a *fi. fa.* was executed on his goods, the court of Common Pleas refused relief on motion.⁷

A certificated bankrupt is, also, entitled to be discharged from custody, though his imprisonment is in the nature of a contempt, in not obeying the order of the lord chancellor made in a previous matter of bankruptcy—that is, if such order is for the *payment of money* by him, which could be proved under his commission.⁸ And the like, where he has been committed on an attachment for non-payment of the costs of an action, pursuant to a rule of court.⁹

¹ *Kemp v. Neville*, 5 Moore, 21.

² *Yeo v. Allen*, Tidd. Prac. 215.

³ *Woolcot v. Leicester*, 6 Taunt. 75.

⁴ *Sadler v. Cleaver*, 7 Bing. 769.

⁵ *Calcraft v. Swan*, Barnes, 204.

Ashdown v. Fisher, *ibid.* 206. *Callen*

v. Meyrick, 1 T. R. 361.

⁶ *Lister v. Mundell*, 1 Bos. & P. 427. 3 Bl. Com. 406; and see *Anon.* 1 Salk. 93, and *Wicket v. Cremer*, 1 Ld. R. 439. 1 Salk. 264. Even though it is stated on behalf of the creditor, that the bankruptcy was collusive, and that in an action by

the assignees, a jury had found against the plaintiffs, as to the fact of the trading. *Barrow v. Poile*, 1 B. & Adol. 629.

⁷ *Hanson v. Blakey*, 4 Bing. 493.

And *Hewes v. Mott*, 1 B. & P. 427.

⁸ *Ex parte Eicke*, 1 G. & J. 261.

S. P. on an attachment for not paying money pursuant to a rule of court, notwithstanding the money had been received by the bankrupt in his character of attorney. *R. v. Edwards*, 9 B. & C. 652. And see ante, 603.

⁹ *Riley v. Byrne*, 2 B. & Ad. 779.

It has been suggested, that bankruptcy and certificate is no ground of discharge of a prisoner in custody on a *capias utlagatum*; ¹ though it is somewhat difficult to extract such a position from the very confused report of the case, which is cited as an authority for it.

As to the discharge of a bankrupt, when he is arrested upon a new promise to pay a debt barred by the certificate, see the following section.

Where a joint action is brought against a bankrupt (who has obtained his certificate) along with other defendants, the bankrupt's name will be struck out of the proceedings, unless he is indemnified by the plaintiff.²

SECTION VII.

Of the Bankrupt's Liability on a new Promise.

Though a bankrupt is discharged by his certificate from all debts due at the time of his commission, he may still make himself liable on a *new promise* to pay any one of those debts; for, though all *legal* remedy of the creditor is taken away by the statute, the debt itself is clearly not extinguished in *conscience*; and every honest man, as Lord Mansfield observed, would discharge all debts owing by him at his bankruptcy, if he afterwards had it in his power to do so.³ But it is provided by 5 & 6 Vict. c. 122, s. 43, that such promise must be *in writing*, in order to bind the bankrupt; and it must also be either signed by himself, or by some person lawfully authorized in writing by him.

A letter by the bankrupt promising to pay the debt, but subscribed by a mark which it was doubtful whether it was an initial letter of his name, or a mere flourish, was held not to be a sufficient signature under this section; and where such a letter was without a date, it was also held that it could not be supplied by parol evidence.⁴

The existence of the debt *in foro conscientie* is a sufficient consideration for the bankrupt's promise to pay it; and *indebitatus assumpsit* will lie against him on the original consideration, to which the certificate will be no bar;⁵ neither

¹ *Beauchamp v. Tomkins*, 3 Taunt. 141.

² *Ex parte Read*, 1 Rose, 460. 1 V. & B. 346.

³ *Per* Ld. M. 2 Cowp. 548. *Per* Ld. Hard. 1 Atk. 256.

⁴ *Hubert v. Moreau*, 2 Carr. & P. 528.

⁵ *Penn v. Bennett*, 4 Camp. 205. *Williams v. Dyde*, Peake, 68. *Dillon v. Bailey*, *cit.* Cowp. 549.

need the plaintiff declare specially on such new promise; but it will be sufficient for him to declare generally, and give the subsequent promise in evidence.¹ If, however, the promise is conditional, then there must be a special count, stating the bankruptcy, and subsequent promise to pay.²

The bankrupt, also, may after his bankruptcy give a creditor (who does not come in under the commission) a valid security for the whole, or for part of his debt, which will not be barred by his certificate. As where a bankrupt, who was indebted to the plaintiff upon two notes for 63*l.* 9*s.* each (which were not proved under the commission), voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes, and cancel and deliver them to the bankrupt—and the plaintiff accordingly did so, and took in exchange from the bankrupt a fresh note for 67*l.*;—it was held, under these circumstances, that a plea of bankruptcy and certificate would not bar the plaintiff's demand on the last-mentioned note—and that, as there was no scheme on the part of the plaintiff to deceive or impose upon the bankrupt, the plaintiff might recover.³ So, if a bankrupt after being discharged by his certificate applies to one of his creditors (who had proved under the commission) to lend him a sum of money to carry on his trade, or to become his security for any office—and as a consideration executes a bond for the old debt,—such bond is valid.⁴ So, also, if a bankrupt pay interest upon a bond proveable under the commission, after having obtained his certificate,—it will be an admission by him that the principal was then due, and he will be liable as on a new contract.⁵

A promise, also, (made after bankruptcy to pay an old debt) is equally binding on the bankrupt, though it is made *before* he obtains his certificate; and such promise is not destroyed by the certificate being obtained afterwards.⁶ So, where a bankrupt after his bankruptcy, and *before* certificate, indorsed to the plaintiff two promissory notes, to secure a debt due before the bankruptcy, the certificate subsequently obtained was held no bar to an action on the notes.⁷ Where, also, a defendant was in execution at the suit of the plaintiff, and a commission of bankrupt issued against him—soon after which, in order to regain his liberty, he gave the plaintiff a

¹ *Penn v. Bennett*, 4 Camp. 205.

² *Lacy v. Mackenzie*, 4 C. & P. 464.

³ *Trueman v. Fenton*, 2 Cowp. 544.

⁴ *Ex parte Burton*, 1 Atk. 256.

⁵ *Alsop v. Brown*, Doug. 192.

⁶ *Roberts v. Morgan*, 2 Esp. 736.

⁷ *Briz v. Braham*, 1 Bing. 281.

⁸ *Moore*, 261.

bond and warrant of attorney to confess judgment for the old debt—and the defendant afterwards obtained his certificate under the commission,—the certificate was held to be no bar to the plaintiff's recovering; for the bond and warrant of attorney being given to procure the defendant's liberty, the old debt became thereby extinguished, and it was considered to be a new debt¹ arising upon a new consideration. And upon the same principle, where a cognovit was given by an insolvent after his discharge, upon proceedings commenced before, it was held to constitute a new promise, upon which he became liable notwithstanding his discharge.² But any transaction of this nature will of course be invalid, if the object is to obtain a creditor's signature to the certificate,³ or to dissuade him from opposing the allowance of it by the lord chancellor.

In a case where a bankrupt, after obtaining his certificate, said, "*the plaintiff should be no loser, but that he would pay when he was able*,"—two of the judges held that this was a conditional promise, and that the plaintiff ought to have shown that the defendant *was able to pay*; but Lord Loughborough thought it amounted to an *absolute* promise.⁴ And where the bankrupt wrote to a creditor saying, "By the end of next month I shall have my banker's account here, and I shall remit the sum due to you by a draft on them,"—it was held that this was an absolute promise.⁵ General declarations, however, by the bankrupt, "*that he would pay everybody, and that his effects would pay 20s. in the pound*,"⁶ are not sufficiently precise and positive to bind the bankrupt by a new promise, which should be in itself express, distinct,⁷ and unequivocal. And even a promise by the bankrupt to deliver goods in satisfaction of the debt, seems not to be such a promise as will revive it.⁸ And a subsequent promise to pay a promissory note, which had been given to a creditor by way of fraudulent preference, is a promise without consideration, and will not therefore support an⁹ action.

Where a certificated bankrupt was *arrested* for an old debt contended to have been revived by a new promise,

¹ *Birch v. Sharland*, 1 T. R. 715.⁶ *Lynbry v. Weightman*, 5 Esp.² *Sweeney v. Sharp*, 4 Bing. 37.

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³ See ante, 628.⁷ *Fleming v. Hayne*, 1 Star. 370.⁴ *Beaford v. Saunders*, 2 H. B. 116.⁸ *Tattle v. Grimwood*, 11 Moore, 434.⁵ *Lacy v. Mackenzie*, 4 C. & P. 464.⁹ *Cockshott v. Bennett*, 2 T. R. 763.

namely, to "pay when he was able,"—the court of King's Bench discharged him upon common bail; Lord Mansfield observing, that to keep a man in prison upon a *conscientious* obligation, would be taking advantage of his conscientiousness to use it against all conscience.¹ And in a recent case, the court has acted upon the same principle, where the bankrupt was alleged to have made even an *absolute* promise to pay the debt, the chief justice saying, "that it was a question for the *jury*, whether, or no, the bankrupt has made himself liable by a new promise; and, until they have decided that question against him, he is entitled to be discharged."² The like principle, also, has been adopted by the court, where an insolvent debtor has made an *absolute* promise to pay a debt contracted prior to his discharge under the insolvent act.³ The court of Exchequer, however, have determined, that, when the promise of the bankrupt to pay is *absolute*, the bankrupt may be arrested⁴—on the principle, as it seems, that where the debt is *completely revived* by a subsequent promise to pay it, all its legal incidents are also revived; one of which is, the right of the creditor to hold his debtor to bail. This judgment is professed to be founded on the authority of two old cases in the King's Bench, in one⁵ of which the point appears to be so decided; but in the other,⁶ the court merely refused to set aside an *execution* against the *goods* of a defendant, who, having been discharged under the insolvent act, gave a note for a part of the debt not paid under the assignment. Moreover, the reasons assigned by the court of Exchequer for its judgment, it must be confessed, do not appear to be very tenable;—for the debt cannot be said to be "*completely revived*," until a *jury* have found it to be so; and the mere *allegation of the plaintiff in his affidavit* to hold to bail, can never be contended to amount to any evidence of such absolute revival.

Where a bankrupt promised a creditor to pay him a sum

¹ *Bailey v. Dillon*, 2 Burr. 736.
Ford v. Chillon, 2 Bl. 799.

² *Peers v. Gadderer*, 1 B. & C. 116. The words of the 126th section are also extremely strong, viz. "any bankrupt, who, after his certificate shall have been allowed, shall be arrested for any debt made proveable under the commission, shall be discharged upon common bail."

³ *Wilson v. Kemp*, 3 M. & S. 595. *Turner v. Schomberg*, 2 Str. 1233. Sed vide contra, *Horton v. Moggridge*, 6 Taunt. 563.

⁴ *Blackbourn v. Ogle*, 8 Pri. 526.

⁵ *Drew v. Jefferies*, Hil. T. 1786.

8 Pri. 531. 1 Tidd. Prac. 231.

⁶ *Best v. Barker*, Mich. T. 1782. 8 Pri. 533.

certain, in consideration that he would not come under the commission—and the creditor afterwards petitioned the lord chancellor against the allowance of the bankrupt's certificate—this was held to be a waiver of the agreement—and that the creditor was thereby deprived of all claim to any benefit which he might have otherwise derived under it; for, by opposing the bankrupt's certificate, the creditor had been guilty of *mala fides*, in defeating the object of the agreement by an act which was totally inconsistent with it.¹

¹ *Colls v. Lovell*, 1 Esp. 282.

CHAPTER XV.

OF PARTNERS.

- SECT. 1. *Of the Effect of Bankruptcy generally, as to the Relation between Partners; and herein more particularly of the Effect of a SEPARATE Commission against one, or more, of the Partners.*
2. *What is JOINT, and what SEPARATE, Property under a Joint or Separate Commission.*
 3. *What is a JOINT, and what a SEPARATE, DEBT.*
 4. *Of Proof by JOINT CREDITORS against the Joint and Separate Estates.*
 5. *Of Proof by SEPARATE CREDITORS under a Joint Commission.*
 6. *Of Proof by Creditors holding Joint and several Securities; and herein of the Creditor's ELECTION against the Joint, or Separate, Estates.*
 7. *Of Proof between Partners, and different Firms composing one general Partnership.*

As to the effect of a Secret Partnership, see ante,
“*Reputed Ownership*,” 440.

And as to the right of one Partner to his *Allowance* under a *Joint Commission*, see ante, Chapter XIII. “*Of the Bankrupt's Allowance*.”

Having in a former chapter¹ considered the mode and effect of suing out both a *joint commission* against partners, and a *separate commission* against one or more members of a partnership, it is proposed in this chapter to inquire in what manner a joint, or separate, commission affects the *joint and separate property* of the partners;—and, afterwards, to consider the right of *proof* by the *joint and separate creditors* of the partnership, as well as that between the

¹ Ante, Ch. v. s. 4.

separate estates of the partners themselves; this being a branch of the subject, which it was thought too complex in the present treatise to include under the *general* title of *proof of debts*. The division of the subject-matter intended to be discussed may, it is conceived, be conveniently arranged under the foregoing heads.

SECTION I.

Of the Effect of Bankruptcy generally, as to the Relation between Partners; and herein more particularly of the Effect of a SEPARATE Commission against one, or more, of the Partners. (And see post.)

A *joint commission* against partners, followed by an assignment of the estate and effects, puts an end of necessity to the entire partnership; as all the joint stock and effects, with which the trade could be carried on, become thenceforth vested in the assignees. And, in the same manner, a *separate commission* against *one partner*, followed by an adjudication that he is a bankrupt, determines the partnership also, as to *him*, and avoids all *his* acts¹ from the day of the bankruptcy. It amounts, in fact, to a severance of the joint-tenancy subsisting between him and the other partners;² and his assignees become thenceforth tenants in common with the solvent partner in all the partnership effects. But they cannot sue for any debts or effects of the partnership, without joining the solvent partner as a plaintiff in the action,³ or his personal representatives⁴ in the event of his death; for the assignees of the bankrupt partner take the partnership property, subject of course to all the rights of the solvent partner,⁵ and they can obtain no share of the partnership effects until they first satisfy all that is due from the bankrupt partner to the partnership.⁶ To enable them to do this, the partnership accounts must first be taken, which, it seems, can only be done under the jurisdiction of the court of Chancery.⁷ A *separate commis-*

¹ *Thomason v. Frere*, 10 East, 418. *Hague v. Rolleston*, 4 Burr. 2174.

² *Barker v. Goodair*, 11 Ves. 78. *Ex parte Smith*, 5 Ves. 295.

³ *Eckhardt v. Wilson*, 8 T. R. 140.

⁴ *Fox v. Hanbury*, Cowp. 448.

⁵ *Ibid.*; and see post.

⁶ D. per Lord Tenterden. *Hol- derness v. Shackels*, 8 B. & C. 618.

⁷ *Ex parte Broadbent*, 1 M. & A. 635; 4 D. & C. 3.

sion, indeed, against one partner so completely dissolves the partnership, that in a case, where a solvent partner after the act of bankruptcy of his co-partner indorsed a bill in the name of the firm, Lord Ellenborough held, that an action could not be maintained by the indorsee against the acceptor, where the declaration stated the *two partners* as indorsers; for that at the time of the indorsement the bankrupt partner had no longer any interest in the bill, and was incapable of exercising any act of ownership over it, the partnership having then ceased to exist.¹

With respect to the *validity* of acts done by the *solvent* partner, in the disposal of the partnership property after the act of bankruptcy of his co-partner, there seems to be some difference between the decisions *at law*, and those in *equity and bankruptcy*. *At law*, it has been holden that such a transfer of the partnership property, for a valuable consideration and without fraud, is valid against the assignees—on the ground that the purchaser, or person to whom the property is transferred, thereby becomes a tenant in common with the assignees of the chattel or property so transferred—and that, as one tenant in common cannot sue another, so neither can the assignees in this case bring an action of trover to recover the property back.² In the absence of fraud, indeed, it seems that by such a delivery the *whole legal* property is transferred;³ though Lord Kenyon is reported to have ruled once at *nisi prius*, that it was only good for a *moiety*.⁴ It has, also, been more recently decided, that the circumstance of the solvent partner *having notice of the act of bankruptcy* makes no difference in the case; for where a solvent partner, knowing of the act of bankruptcy of his co-partner, procured a debtor to the partnership to give his bill in part satisfaction of the debt, and then indorsed it to a creditor in payment of the residue of his demand on the partnership,—such a transaction was held good against the assignees of the bankrupt partner.⁵ In this case, certain principles were laid down

¹ *Ramsbottom v. Lewis*, 1 Camp. 279. *S. P. Thomason v. Frere*, supra; and see *Abel v. Sutton*, 3 Esp. 108. 1 Camp. 281, note (b.) But see contra, *Lacy v. Woolcot*, 2 D. & R. 458. In this case, however, the bill was accepted by the bankrupt partner in the name of the firm, the other partner, who was an outgoing partner, having permitted his name to be used.

² *Fox v. Hanbury*, supra. *Smith v. Stokes*, 1 East, 368. *Smith v. Oriell*, ibid. 368; and see *Ramsbottom v. Cator*, 1 Star. 228.

³ Per Lord Kenyon, 1 East, 369. Per Bayley, J., 5 M. & S. 342.

⁴ *Whitwell v. Thompson*, 1 Esp. 72.

⁵ *Harvey v. Crickett*, 5 M. & S. 356.

by the judges, which seem to throw great light on this subject, that was previously involved in no small degree of obscurity. It was observed by Lord Ellenborough, that though for future purposes the act of bankruptcy operates as a dissolution, so as to prevent the solvent partner from dealing with the partnership property to the same extent as if the partnership continued, yet that he has clearly a *lien* on the joint funds in his hands, in respect of all claims which were *consummate* at the time of the bankruptcy;— and that, where the solvent partner applies part of those funds in satisfaction of such a claim, the assignees cannot bring an action against the person to whom such funds have been so transferred; at any rate, not until the partnership account is taken, and it is ascertained whether the assignees are entitled to recover a balance against the solvent partner. For to entertain such an action, his lordship added, would be pregnant with all the inconveniences that would attend an action upon an unliquidated account between partners. Mr. J. Bayley, too, in his judgment, very forcibly points out the many difficulties that would ensue, if the power of the solvent partner to dispose of the partnership effects (in payment of a partnership debt) ceased by the bankruptcy of the other partner; and Lord Tenterden (who took a part in this decision) said, that if a solvent partner is not thus at liberty to apply the partnership funds, he might be ruined in the midst of abundance of property capable of paying all the debts; and the creditors, also, would be compelled to wait until such time as assignees are chosen, and it is their pleasure to make distribution.

Accordingly, it has been since decided, that where the solvent partner, thinking the firm capable of paying its debts, continued the business after the bankruptcy of his co-partner, and paid partnership money into a banker's, to be applied in discharge of running bills of the firm payable at the bank, and it was so applied; such payment being made *bonâ fide*, and without any contemplation of bankruptcy by the solvent partner, was valid at law. And a fresh account having been opened by the assignees and the solvent partner with the bank, and having paid in 900*l.* to discharge a debt on the old account, and the second partner then becoming bankrupt, it was also held that the assignees of the second partner could not recover the last sum.¹

It is difficult, however, to reconcile the following judgments of Lord Eldon with this doctrine of the court of

¹ *Woodbridge v. Summ*, 4 B. & Ad. 633.

King's Bench; and, more especially, what he is reported to have said in one case,¹ namely, that *all transactions* affecting the joint property are *overreached* by the prior act of bankruptcy of one of the partners. In the first of these cases, where a bill was filed by the assignees of a bankrupt partner for an injunction against a joint creditor, who had *after* the act of bankruptcy, though *before* the commission, attached the partnership goods in the Lord Mayor's court, Lord Eldon granted the injunction—upon the principle, that a separate commission severs the joint-tenancy, and vests the bankrupt partner's share of the joint property in the assignees, by relation from the act of bankruptcy.² And the same order was made in another case of a similar description, where the joint creditor had even obtained judgment in the attachment³—his lordship expressing his opinion, that if, after an execution against one partner, a commission of bankruptcy issues against him upon an act of bankruptcy antecedent to the execution executed, whatever may have been taken under the execution becomes by relation the property of his assignees, to be applied among all the joint creditors exactly as the application is made in bankruptcy. And he afterwards acted upon this opinion in a subsequent case, where joint effects had been taken in execution after an act of bankruptcy committed by one of the partners—in which he held, that the assignees were entitled to the property so seized;⁴ for that, the partnership being put an end to the moment an act of bankruptcy was committed by one of the partners, a creditor could only take the interest of that partner subject to the partnership dealings.⁵

With respect to these very opposite judgments in bankruptcy and at law, there is certainly one difference in the facts upon which they are founded; but it does not seem to be very material for the purpose of the argument. In the cases decided at law, the creditor got possession of the property *with the consent* of the solvent partner; in those decided in equity, possession was obtained *without his consent*, but still by due process of law, in satisfaction of a just debt.

There is one case, however, which has been decided in a court of equity, not quite so much at variance with the decisions at law, and in which Sir W. Grant determined,

¹ *Barker v. Goodair*, 11 Ves. 78.

⁴ *In re Wait*, 1 Jac. & W. 605.

² *Ibid.*

⁵ But see *Heydon v. Heydon*,

³ *Dutton v. Morrison*, 17 Ves. Salk. 392, contra.

193. 1 Rose, 213.

that where a joint creditor of a partnership (principally carried on in the West Indies) had attached joint property there, the assignees of one of the partners (who became bankrupt in England) were entitled only to the *surplus* of the property in the hands of the creditor after satisfaction of his joint debt; and this upon the ground, that the West Indian *solvent partners could not be controlled* in the management of their trade, or restrained by any proceeding here, from paying and applying the partnership assets as they thought fit.¹

An acknowledgment of a debt by one of two partners, made after he has obtained his certificate, is not sufficient to take the case out of the statute of limitations so as to charge the other partner.²

A partner, it has been held, may have no interest in the *property* of the partnership, though he may be interested in the *profits* of the concern—Sir J. Mansfield saying, that there was a clear distinction between being partners in goods, and being jointly interested in adventure.³ A transfer of the *property*, therefore, by such a partner (after the bankruptcy of the partner solely interested in such property) is, of course, void as against the assignees.⁴ But under a commission of bankruptcy, the property in such a case is, nevertheless, administered (as to the joint creditors) as belonging to *all* the partners.⁵

Where a dormant partner is admitted as a member of a firm, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such.⁶

If one partner embezzles part of the partnership effects and becomes a bankrupt, his assignees can be in no better situation than the bankrupt himself, taking only such undivided share or interest as the bankrupt himself had, and subject to all the rights and liens of the other partner; they are, therefore, entitled only to the share of the balance remaining after the partnership debts are paid, and after the deduction of the amount of the⁷ embezzlement.

The assignees of the bankrupt partner take by the assignment all the *interest* which the bankrupt himself was entitled to at the time he became a bankrupt. Therefore, where the

¹ *Brickwood v. Miller*, 3 Meriv. 279.

⁵ *Ex parte Hunter*, 2 Rose, 382.

² *Martin v. Bridges*, 3 C. & P. 83.

⁶ *Ex parte Chuck*, Mont. 364. 457. 8 Bing. 469.

³ *Per Mansfield, C. J., and Gibbs*, J., 5 Taunt. 79, 80.

⁷ *Richardson v. Gooding*, 2 Vern. 293.

⁴ *Meyer v. Sharpe*, *ibid.*

²⁹³ *Goss v. Dufresnoy, Davies*, 371.

bankrupt partner had advanced part of his share of the expense of an adventure, and gave his notes for the remainder, which did not become due until after the issuing of the commission—it was held that the solvent partners could not (by discharging the notes) stand in his place, but that the assignees were entitled to his full share in the profits of the adventure—although the note creditors received only a dividend under the commission, and it was uncertain (at the time of the bankruptcy) whether the adventure would be attended with profit or loss.¹

But where two partners in an adventure jointly undertook to procure a cargo for a vessel for certain commission, which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money, and the other partner became bankrupt, without any account having been settled between them, it was held (*Bayley, J., dub.*) that the assignees could not maintain money had and received for a moiety against the solvent partner.²

Where the solvent partners continued to carry on the partnership trade with the capital, as constituted at the time of the bankruptcy,—the assignees of the bankrupt partner were held entitled (beyond an account and distribution of the stock, &c.,) to a participation of subsequent profits made by the solvent partners, as far as the profits might have been produced by an application of such capital.³ The solvent partner, however, is always entitled to retain the partnership books,⁴ and he may bring an action in the name of the assignees of the bankrupt partner as well as his own, in order to recover a debt due to the partnership.⁵

If there is a surplus under a separate commission against the bankrupt partner, the solvent partner may apply by petition for an account of such surplus, and for payment of his proportion of it.⁶

The payment of a dividend, under a commission against one partner, raises a new assumpsit by the other, so as to deprive that other partner of the benefit of the statute of limitations.⁷

Where a solvent partner had paid the other before his bankruptcy a sum of money to be applied in discharge of a

¹ *Smith v. De Sylva*, Cowp. 469.

² *Bovill v. Hammond*, 6 B. & C. 149. *Quære tamen*, as the bankruptcy of itself determines the partnership. See ante, 677.

³ *Crawshaw v. Collins*, 15 Ves. 218. ² Russ. 325.

⁴ Ex parte *Finch*, 1 D. & C. 274.

⁵ *Whitehead v. Hughes*, 4 Tyr. 92.

⁶ Ex parte *Lanfeur*, 1 Rose, 442.

⁷ Ex parte *Deirdney*, 15 Ves. 499.

joint debt, and the latter converted the money to his own use—and the solvent partner was, after the bankruptcy of the other, compelled to pay the whole debt to the creditor,—the bankrupt partner was held in this case (by reason of the fraud) not protected by his certificate, in respect of the share of the joint debt paid by his co-partner¹ after the bankruptcy. This case, however, was decided before Sir Samuel Romilly's act, which first enabled a surety, paying money after the bankruptcy of the principal, to prove it as a debt under the commission. Therefore, if such a case can be considered as divested of *fraud* on the part of the bankrupt partner, and the solvent partner had an opportunity of proving under the commission, the certificate would now operate as a discharge of the claim of the solvent partner.

Where a separate commission issues against one or more members of a partnership, it is provided, by section 89 of the new statute, that the assignees may use the name of the solvent partner in any action or suit for the recovery of any debt due to the partnership, and that the solvent partner shall not have power to release the debt for which such action is brought. But, if he claims no benefit from the proceedings, he is entitled to an indemnity against the costs; and if he does claim any benefit, he may then petition the lord chancellor to direct that he may receive so much of the proceeds of the action or suit as the chancellor shall think fit.

If one of two attorneys in partnership become bankrupt, the court will not, on motion, order the assignees to deliver the papers of the clients to the solvent partner, without the clients' consent.²

SECTION II.

What is JOINT, and what SEPARATE, Property under a Joint or Separate Commission.

When a *separate* commission issues against either one or more members of a partnership, all transactions affecting the joint property have been said to be *overreached* by the act of bankruptcy of the bankrupt partner, that is, so far as that a joint creditor will not (as we have just seen) be allowed afterwards to proceed against the joint effects by foreign attachment³—the assignees of the bankrupt partner taking all the

¹ *Wright v. Hunter*, 1 East, 20; and see ante.

² *Davidson v. Napier*, 1 Sim. 297.

³ Sed vide ante, 680, et seq.

separate property, and all the bankrupt's interest in the joint property, and holding the latter as tenants in common with the solvent partner. The assignees of the bankrupt partner, however, are not strictly partners with the solvent partner, though a necessary community of interest remains between them till the partnership affairs are thoroughly wound up, requiring that what was partnership property before, shall continue so for the purpose of a distribution among the partnership creditors, as well as of a division of the surplus in proportion to the respective interests of the partners.¹ And the arrangement of such interest will be made, as the partner stood at the time—not of the commission,² but—of the act of bankruptcy. The right of the assignees, as to the joint property, has been said to be derived more from the rule of the common law, (as far as it respects trade between partners,) than from any rule arising out of the bankrupt laws; and the interest which they take in it can only be made available, upon the balance of accounts between the partnership and the bankrupt partner; in stating which account, enough must be left to cover partnership debts.³

The assignees, therefore, under a separate commission are entitled to deal with the joint property as the solvent partner himself might have dealt with it—that is to say, paying all the joint creditors equally as far as the joint property goes, and applying the surplus under all the equities subsisting between the partners.⁴ Under special circumstances, however, an injunction may be applied for by the solvent partner against the sale of the property by the assignees, upon his offering to account;⁵ but this, it is apprehended, will only be granted where a sacrifice is about to be made of the property, or there is some irregularity in the sale; or where the solvent partner engages to pay over to the assignees the value of the share of the bankrupt partner in the property offered for sale.

It is sometimes thought expedient to consolidate the joint and separate estates; but the lord chancellor will not sanction such a measure, without a reference to the commissioners to inquire and report, whether such a proceeding would be for the general benefit of the creditors.⁶

The equities subsisting between partners involve the consideration of the effect of an assignment of partnership prop-

¹ 6 Ves. 126.

² Ibid.

³ *Field v. —*, 4 Ves. 397.

⁴ *Barker v. Goodair*, 11 Ves. 85.

Dutton v. Morrison, 17 Ves. 209.

Hankey v. Garrett, 3 Bro. 457.

1 Ves. jun., 236.

⁵ *Allen v. Kilbie*, 4 Mad. 464.

⁶ *Ex parte Strutt*, 1 G. & J. 29.

party by a *retiring* to a *continuing* partner—and, in what cases, any portion of the *joint property* of the partnership becomes (by such assignment) *separate estate*. This depends altogether upon the *bona fides* of the transaction between the partners, and the non-interference of the joint creditors at the time of the transaction. The mere *dissolution* of a partnership, indeed, does no more than declare that the partnership is not to be carried on any further, except for the purpose of winding up the concerns; and he who has the actual possession of the joint property, has it (in that event) clothed with a trust for the other, to apply it in payment of the joint debts. This will so far qualify the nature of his possession, that the specific effects or debts will not be considered to be *solely* in his order and disposition, to the prejudice of the claims of the other partner. But if, upon a fair and open dissolution of a partnership, the partner retiring, either by deed or otherwise, *bonâ fide* transfers his interest in the partnership effects to the continuing partner—who afterwards carries on the trade and becomes a bankrupt before all the joint creditors have been paid;—in this case, the joint creditors have no equity, either upon the partnership effects remaining in specie, or the outstanding debts.¹ Therefore, where an outgoing partner assigned by deed his share of the stock to the continuing partners, and they and a surety covenanted that they would in due time discharge all the partnership debts, and indemnify the outgoing partner—and six months after the dissolution, the continuing partners became bankrupt, and the outgoing partner was arrested by creditors of the old partnership;—he was held, upon petition, not entitled to have the specific stock and debts of the old partnership applied in satisfaction of the creditors of that partnership, in preference to the creditors of the² new firm. Nor, where the retiring partner agrees that certain articles of the stock shall become the exclusive property of the other partner, and that a certain

¹ Ex parte *Ruffin*, 6 Ves. 119. Ex parte *Williams*, 11 Ves. 3. Ex parte *Slow*, C. B. L. 539; and see ex parte *Harris*, 1 Mad. 583. There is an old case before Lord Hardwicke, (ex parte *Barnaby*, 1 C. B. L. 246,) which seems somewhat at variance with the doctrine in the text. It is not, however, (as Lord Eldon observed in ex parte *Ruffin*,) very intelligible; and his lordship thought also there was a material distinction in that case, inasmuch as the

assignment there was, not by one partner to the other two, but only to one of the other two. It does not, moreover, appear in that case, that the assigning partner had *actually retired* from the business. A retiring partner is, however, still liable to a creditor of the old firm; and this though the creditor assents to the transfer of his debt to his credit by the new firm. *Davil v. Ellice*, 5 B. & C. 196.

² Ex parte *Fell*, 10 Ves. 347.

fund shall be appropriated to the payment of the debts, which afterwards proves deficient, has he any lien on such articles for the deficiency.¹ In such a case, however, it is very easy for a retiring partner to provide for his own indemnity, by assigning all the effects *upon trust to pay the debts*.² But, where a retiring partner assigned the partnership estate and effects to a continuing partner, in consideration of the continuing partner accepting certain bills of exchange—and afterwards, the continuing partner having refused to accept the bills, an injunction was granted against him, and a receiver appointed upon a bill filed by the retiring partner;—upon the subsequent bankruptcy of the continuing partner, it was held, that the previous interference of the court restored the property to its original character as joint property, unless the plaintiff in equity had (by his conduct between the time of his obtaining the injunction and the bankruptcy) rendered nugatory the effect of such interference.³

Upon a dissolution of partnership between A. and B., it was agreed, that until A. was provided for, B. should continue the business, and allow him a third of the profits: B. afterwards formed a partnership with C., and carried into it the stock of A. and B., and a commission of bankrupt issued against B. and C.;—it was held, under these circumstances, that the joint property of A. and B. having been permitted by A. to become property visible to all the world of the new partnership of B. and C., the share of B. in the residue of the joint effects was the *separate* property of B., and subject to the payment of his separate creditors.⁴

So, where one of four partners died, and the surviving partners compromised a debt due to the original firm, for which they obtained securities, and afterwards became bankrupt, it was held that the securities were, by reputed ownership, distributable amongst the creditors of the three surviving partners.⁵ But where goods had been purchased by the original firm on the joint account of themselves and two other firms, in shares of one-third each, and the goods remained in the possession of one of the other firms up to the time of the bankruptcy of the three surviving partners; in this case it was held that the third share in the goods did not belong to the surviving partners, but to the original firm.⁶ So, where the original firm had consigned goods to Hayti, which were returned, but

¹ *Lingen v. Simpson*, 1 Sim. & St. 600.

² *Ex parte Fell*, 10 Ves. 347.

³ *Ex parte Rowlandson*, 1 Rose, 416. 2 Ves. & B. 172.

⁴ *Ex parte Barrow*, 2 Rose, 252.

⁵ *Ex parte Tayler*, Mont. 240.

the bill of lading for them was sent to the holder of a bill of exchange, drawn on the partnership, which was not accepted, and the goods were in the West India Docks at the bankruptcy of the three; it was held, also, that these goods belonged to the estate of the original firm.¹ So, where the original firm were possessed as mortgagees of real estate, which, after the death of the deceased partner, remained in the possession of the three survivors; this also was held to be the property of the original firm; for real estate is not within the clause of reputed ownership.¹

Where new partners, however, are taken into a trade—and it is agreed that the stock, and the debts due to the old firm, should become the capital of the new partnership, and that the new firm should take upon itself the payment of the debts of the old firm—and the new partnership became bankrupt;—in this case, the joint effects of the new firm were held liable to the joint creditors of the old firm, as well as to the joint creditors of the new firm.²

Where a party, on depositing deeds with his bankers, wrote a letter to them, saying, that the object of the deposit was to secure a particular advance then made by them, “as well as all future advances,” and an alteration took place in the members of the banking firm, but the new firm retained the deeds, and continued to make advances of money; it was held that the new firm were entitled to the benefit of the security.³

But, though partners may *bonâ fide* agree to dissolve their partnership, and that what was joint property before shall thenceforth become the separate property of him who continues the business, yet such agreement will have no effect, unless possession of the property be given pursuant to the contract. And, if there is any *fraud* in the transaction—as if one partner retires when the partnership is really insolvent, and (before the partnership debts are discharged) the continuing partners pay to him large sums of money on account of his share in the business,—such payments are fraudulent and void against the joint creditors.⁴ But the mere circumstance of the partnership being insolvent at the time of the dissolution of it by the retirement of one partner, will not *alone* be

¹ Ex parte *Taylor*, Mont. 240.

² Ex parte *Bingham*, 1 C. B. L. 538. Ex parte *Clowes*, 2 Bro. 595. 1 C. B. L. 250. In re *Staples*, *ibid*. 538. Ex parte *Peele*, 6 Ves. 602.

³ Ex parte *Smith*, 2 M. D. & D. 314.

⁴ *Anderson v. Malby*, 4 Bro. 423.

2 Ves. jun. 244. A fraudulent assignment of property by one partner to another, though an act of bankruptcy in the assignor, does not, as we have before had occasion to observe, amount to such in the assignee. *Whitwell v. Thompson*, 1 Esp. 68—72; and see ante.

sufficient to invalidate a dissolution fairly made, however it may affect his rights to his share of the property, as against the then joint creditors.¹

If real estates are purchased with the partnership funds, though conveyed only to one partner, they are nevertheless partnership property; but if estates are purchased with the partnership fund, and conveyed to one partner under a *specific agreement* that the estates shall be *his*, and that he shall be debtor for the money to the partnership, the estates are in this case his *separate* property.²

Where one of two partners purchased ships with the partnership property—and upon a discovery of the transaction by the other partner, the ships were brought into the partnership account, and the disbursements paid out of the partnership funds, but the registers continued unaltered, for the purpose of enabling the other partner to evade penalties, to which (as a member of parliament) he would have been liable on account of the ships being employed in the service of government—and upon his death a commission of bankrupt was issued against the partner, in whose name the ships were registered;—it was held, under these circumstances, that the ships were distributable as the *separate* property³ of the bankrupt partner. This case was decided with reference to the policy of the then registry acts, the 26 Geo. 3, c. 60, and 34 Geo. 3, c. 68; and other cases also, under those acts, have decided that the registry of a ship was conclusive evidence of property, even against the claim of creditors upon a joint purchase,⁴ and various acts of apparent ownership. But now, by 3 & 4 W. 4, c. 55, s. 36, purchasers and mortgagees of a ship are declared to have priority, not according to the respective times of the registry of the bill of sale, but according to the time when the indorsement was made at the custom-house upon the certificate of registry. In a subsequent case, however, under a commission against two partners, it has been held, that where ships are purchased or built, and paid for out of the partnership funds, though they are registered in the name of one of the partners, yet, being in the ordering and disposition of both, the ships form part of the *joint* estate.⁵

If one joint owner of a ship insures his share or interest,

¹ Ex parte Peake, 1 Mad. 353.

² Smith v. Smith, 5 Ves. 189.

³ Lyster v. Dollond, 1 Ves. jun. 435.

⁴ Thornton v. Dixon, 3 Bro. 199.

⁵ Curtis v. Perry, 6 Ves. 739.

⁴ Camden v. Anderson, 3 T. R.

709. Ex parte Yallop, 15 Ves. 60.

Ex parte Houghton. 17 Ves. 251.

¹ Rose, 177.

⁶ Ex parte Burn, 2 Jac. & W. 378; and see *anté*, 462.

and a loss happens, the money recovered upon the insurance will be separate property.¹

Where *three* partners were manufacturers in Lancashire, and sold their goods in the name of *two* only, and a credit was acquired by them, as three in Lancashire, and two in London,—the distribution of their property in bankruptcy was held to be where the order and disposition was at the time of the bankruptcy.²

So, where A. and B. admitted W. as a dormant partner, and it was stipulated that the stock and effects of the old firm should form part of the capital stock of the new partnership, and that W. should be paid 10 per cent. on the capital, but should not otherwise interfere; and the business was carried on, as before, in the names of A. and B., until the new firm became bankrupt; it was held, that all the present chattels of the new firm were within the order and disposition of A. and B., and ought to be administered as the separate estate of the two, notwithstanding some of the creditors had notice of the dormant partner.³

Whatever expense assignees under a separate commission have been put to in getting in the joint estate, must be reimbursed out of the joint estate.⁴

Although the *property* of a partnership be only in *one* or *more* members of it, with an interest in the *profits* merely in the others,—yet, in bankruptcy, the property is administered, with respect to the claims of the joint creditors, as belonging to *all* the partners.⁵

SECTION III.

What is a JOINT, and what a SEPARATE, DEBT.

A partner, dealing in the name of the partnership, may by simple contract bind his co-partners without their express assent;⁶ and this even in a matter not relating to the partnership, provided the person, with whom such partner deals, has *no notice* that he is dealing on his separate account. But, if it is manifest to a person advancing money to an individual partner, that it is upon his *separate* account, (and therefore against good faith that such partner should pledge the partnership,) it is then incumbent on the person dealing with him to show, that the partner had some *authority* to bind the

¹ Ex parte *Perry*, 5 Ves. 575.
Ex parte *Brown*, 6 Ves. 136.

² In re *Shakeshaft*, cit. 6 Ves. 747.

³ Ex parte *Jennings*, Mont. 45.

⁴ Ex parte *Rutherford*, 1 Rose, 201.

⁵ Ex parte *Hunter*, 2 Rose, 382.

⁶ Ex parte *Gardome*, 15 Ves. 286.

partnership;¹ otherwise the firm will not be liable. Therefore, where one partner gives an acceptance in the name of the firm, in satisfaction of his own private debt, and *without* the knowledge of his co-partner, such an acceptance does not bind the joint estate.²

But where two of six partners, who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, directed the clerk to sign four promissory notes in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm in respect of an excess of capital advanced by them for the purposes of the partnership; and the two partners afterwards indorsed the notes to a separate creditor for a private debt of one of the two; it was held, that although, as between these two partners and the other members of the firm, the notes were unjustifiably created and possessed by the two, yet, in the absence of all fraud or connivance in the transaction by the party to whom the notes were indorsed, the firm of the six were liable for the amount, and that, on the bankruptcy of the firm, the holder of the notes had a right to prove the amount of them against the joint estate.³

The authority, however, of one partner in drawing or accepting bills is only an implied authority, and confined to partnerships for the purpose of *trade*; one of two attorneys, therefore, in partnership, has no implied authority to bind his partner by a note in the name of the firm, although given for their joint debt.⁴ The authority, also, may be rebutted by express previous notice to the party taking the bill, that the other partner would not be liable for it,—even though the partner giving the bill represented to the holder that the money (advanced by him as a consideration for the bill) was to be applied to partnership purposes—and though the greater part was in fact so applied.⁵ Where the other partners, however, are in any way privy to the transaction, and permit him to go on with it, or to repeat it, without expressing any disapprobation, they will then be considered to have approved of the act of the partner so pledging the partnership name; and such subsequent approbation will be equivalent to previous consent.⁶ And the act of one partner, done with

¹ *Ex parte Peele*, 6 Ves. 602.
Arden v. Sharpe, 2 Esp. 524.

² *Ex parte Goulding*, 2 G. & J. 118. *Ex parte Thorpe*, 2 Dea. 16.

³ *Ex parte Bushell*, 3 M. D. & D. 615.

⁴ *Hedley v. Bainbridge*, 3 Q. B. Rep. 316.

⁵ *Lord Gaiway v. Mathew*, 1 Camp. 403. 10 East, 264.

⁶ *Ex parte Bonbonus*, 8 Ves. 541.

reference to business transacted by the firm, will bind all the partners, although it be out of the regular course of trade, and be contrary to an express arrangement amongst themselves; because it is within the scope of his authority.¹

So one partner may give a guarantee that will bind his co-partners, where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it.²

And where one of two partners, after an act of bankruptcy committed by the other, accepted three bills in favour of a joint creditor, who indorsed them for a valuable consideration to a third person, who had no notice of the act of bankruptcy, it was held that the owner could prove them against the joint estate.³

If one of several partners apply trust property, *with the privity of the other partners*, to the purposes of the partnership, the debt may be proved either against the joint estate, or the separate estate of the partner so misapplying the money.⁴ And the same where the other partners were ignorant of the transaction, but with common diligence could have known of it.⁵ But if the other partners have *no knowledge* or means of knowledge whatever that the money is *trust money*, then there can be no proof against the joint estate.⁶

Where the commissioners, under a lighting act, nominated J. F. as treasurer, who was a partner in a banking-house, and the collector paid all monies which he received into the banking-house by authority of the commissioners, who, nevertheless, when making disbursements, drew checks upon J. F. individually, as treasurer, which checks, however, were not presented to or paid by him, but by the banking-house; and the account in the pass-book was kept between the banking firm and the commissioners, and this account was, from time to time, signed and allowed by the commissioners; it was held, that the commissioners could not prove against the separate estate of J. F., but only against the joint estate of the firm.⁷

Where one of two partners, previous to his marriage, withdrew 1000*l.* from the partnership funds, which he presented to his intended wife, and he afterwards withdrew

¹ *Sandilands v. Marsh*, 2 B. & A. 673

² *Ex parte Nottle*, 2 G. & J. 295.

³ *Ex parte Robinson*, 3 D. & C.

376. 1 Cooper, Sel. Ca. 162, over-

ruling *ex parte Ellis*, 2 D. & C. 555.

⁴ *Ex parte Watson*, 2 Ves. & B.

414. *Smith v. Jameson*, 5 T. R. 601.

⁵ *Marsh v. Keating*, 1 Bing. N. C.

198. And see *ex parte Bolland*,

1 M. & A. 570, and *ex parte Woodin*, 3 M. D. & D. 399. And see post.

⁶ *Ex parte Apsey*, 3 Bro. 265.

Ex parte Heaton, Buck, 386. But

see *Stone v. Marsh*, 6 B. & C. 551,

and post, 656. *Hume v. Bolland*,

1 Ry. & M. 371.

⁷ *Ex parte Dobinson*, 2 Dea. 341.

1000*l.* more, to assist in forming a provision for her and the child of the marriage, the trusts of which were declared by an ante-nuptial settlement, and the trustees, in the exercise of a power given them by the settlement, lent these two sums to the partnership, and took the joint bond of the two partners, to secure the repayment; it was held, that the trustees might prove against the joint estate for the amount secured by the bond.¹

Where partners, who have previously contracted debts, take a fresh person into partnership, and give paper of the new firm to a creditor in payment of a previous debt, such transaction (without evidence of the assent of the new partner) will not be binding upon him,² provided the party taking the security had either actual knowledge, or by necessary inference must have known that the payment was without the consent of the new partner. But, where the creditor receives it *bona fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner giving the security, can disaffirm the transaction.³

Where a party, after trading separately and contracting a separate debt with a creditor, enters into partnership with another person, the separate debt cannot be converted into a joint debt, in the absence of all direct evidence of the assent of the creditor to such conversion.⁴

But where, upon the formation of a partnership between W. and C., W. proposed to a creditor, to whom he was indebted for previous advances, to "consider all credits, advices, and instructions then in force from him, as extending to the new firm, and to transfer any balance that might be either due to or from him to the new firm;" to which proposal the creditor acceded, and accordingly drew bills upon W. and C. on account of former dealings with W., which bills were not paid when due, and W. and C. became bankrupt; it was held that the creditor, after this adoption of W. and C. as his joint debtors, could not prove against the separate estate of W., but only against the joint estate of W. and C.⁵

Where A. and B., being jointly indebted to C., B. became bankrupt; but the joint effects, not being more than equal to the payment of the partnership debts, were left in the possession of A., who afterwards made an arrangement with C. for the payment of his debt by instalments, and, as a further security, handed over the deeds of certain leasehold property

¹ *Ex parte Crofts*, 2 Dea. 102.

² *Sherriff v. Wilks*, 1 East, 48.

Hope v. Cust, cit. *ibid.*

Swan v. Steele, 7 East, 210.

Ridley v. Taylor, 13 East, 175.

⁴ *Ex parte Hitchcock*, 3 Dea. 507.

⁵ *Ex parte Whitmore*, 3 Dea. 365.

Ex parte Jackson, id. 651, and 2 M. D. & D. 146, on appeal.

to which he was separately entitled, for the purpose of preparing an assignment, but only paid some of the instalments, and a separate fiat afterwards issued against him; it was held that this was no evidence of the conversion of the joint debt of A. and B. into the separate debt of A., and that C. could therefore only prove against the joint estate.¹

But where a trader, being indebted to a creditor, entered into partnership with his son, under an agreement, by which the new firm was to take upon itself the liabilities of the sole business, and the firm then rendered an annual account in its own name to the creditor, who made no objection to the form of the account; it was held that this was not sufficient evidence of the conversion of the separate into a joint debt, and consequently, that the creditor had no right of proof against the joint estate.²

The joint responsibility of partners cannot be established, after the separate liability of a single partner was originally contemplated.³ But in a case, where a bill was drawn by one of the partners upon the partnership firm with the privity of the other partner, which, though not accepted, was discounted by the payee, and the proceeds applied to the use of the partnership,—it was held that the payee might sue both partners for the money, although they had incurred no joint liability on the bill.⁴ And the same, where a holder had discounted bills drawn by one partner and indorsed by another, and the money received by means of the bills had been applied for partnership purposes.⁵ And the like, where three partners in England carried on business in America, under the name of one alone, and *that one partner* in America had, to promote the interests of the partnership, indorsed bills in his own name; such indorsement being considered as the indorsement by the firm.⁶

Where a customer, having deposited certain securities with his bankers for safe custody, granted a loan of a portion of them to one of the partners for his own private purposes, upon his depositing in their stead certain railway shares; and the partner afterwards, for his own purposes, and without the knowledge of the customer, subtracted the railway shares, and substituted others of less value; it was held, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, and consequently that the customer had no right of proof

¹ *Ex parte Smith*, 1 M. D. & D. 165.

² *Ex parte Parker*, 2 M. D. & D. 511.

³ *Emly v. Lye*, 15 East, 7.

⁴ *Denton v. Rodie*, 3 Camp. 493.

⁵ *Ex parte Bolitho*, Buck, 100.

⁶ *South Carolina Bank v. Case*, 8 B. & C. 427.

against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted; and that even if the partners had been chargeable with any loss occasioned by this subtraction of the shares, on the ground of negligence, it would be a claim for unliquidated damages, and therefore not proveable against the joint estate.¹

Where a *joint creditor* of a partnership takes the *separate security* of one of the partners, without the privity of the others, the others are thereby discharged,² unless their liability be expressly reserved.³ So, where a *separate security* was taken from one of two partners for monies to be advanced, it was held not to cover advances made to the partnership.⁴ But mere information to a creditor, that a partnership was dissolved, and that one of the partners had taken upon himself to discharge the creditor's debt, was held not to bar him of his right against the other partner, notwithstanding even the creditor might expressly agree to exonerate the other partner from all responsibility; for an agreement to abandon a legal claim, unless there be a *consideration* shown, is a mere *nudum pactum*; and the arrangement between the partners will not deprive the creditor of his original claim, unless he is a party to it himself, and it amounts to satisfaction.⁵

With respect to the liability of a retiring partner to a joint creditor, and to the assignees of such joint creditor, his liability continues, unless the terms of the dissolution of the partnership contain any stipulation that can have the effect of exonerating the retiring partner from his former liability. Therefore, where B. and C. were in partnership, but about to separate, and A., a trader, who was indebted to them, and who was then in insolvent circumstances, in August, 1821, gave a warrant of attorney to B. alone, to secure payment of the debt by instalments, B. knowing that A. was insolvent. In October, 1821, A. committed an act of bankruptcy; and in November, at B.'s desire, he sent goods to the warehouse of B. and C. as a further security for the debt. In December B. and C. dissolved partnership, and the former afterwards received from A. several sums of money, on account of the warrant of attorney, and also sold the goods towards satisfaction of the debt. A commission of bankrupt issued against A. in January, 1823, and in November of that year B. died. Under these circumstances, it was held that A.'s assignees might re-

¹ Ex parte Eyre, 3 M. D. & D. 12.

² Evans v. Drummond, 4 Esp. 89.
Reed v. White, 5 Esp. 122.

³ Bedford v. Deakin, 2 B. & A. 210.

⁴ Ex parte Freer, 2 G. & J. 246.

⁵ Lodge v. Dicus, 3 B. & A. 611.

cover from C. the money paid by A. on the warrant of attorney, by an action for money had and received, and the value of the goods by an action of trover.¹

In the case of a *dormant partner*—when the ostensible partner accepts bills in his own name, though the creditor has no notice that there is a dormant partner at the time he takes the bills—this will not be a discharge of the dormant partner, but he will become liable the moment he is known to the creditor.² Wherever, indeed, there is a dormant partner, and the fact was unknown to the creditor, it is an invariable rule in bankruptcy, that the creditor has an option to consider his debt as either³ joint or separate; and though the creditor had notice of there being a dormant partner, yet he is entitled to prove his debt *pari passu* with the creditors of the firm before the dormant partner was admitted.⁴ But it has been decided in the Common Pleas (a decision which certainly appears far less reasonable), that a defendant in an action may plead in abatement that he has a dormant partner, though the plaintiff had even no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action;⁵ thus enabling the defendant to take advantage of his own wrong, and impede the plaintiff in the recovery of a just debt: for, though a plea in abatement does not entirely bar the plaintiff's claim, but merely gives him a better writ, it nevertheless occasions him considerable delay and expense, and this without any default of his own.

SECTION IV.

Of Proof by JOINT CREDITORS against the Joint and Separate Estates.

The creditors of a partnership, who are denominated in bankruptcy the *joint creditors*, are entitled to a distribution of the joint or partnership estate, without the participation of the separate creditors of any individual partner, until the joint creditors have received 20s. in the pound. And as the joint or partnership estate is, in the first place, to be applied to pay the joint or partnership debts, so in like manner the separate estate of each partner must be first applied to pay all his separate debts. It is proposed, in this section, to con-

¹ *Biggs v. Fellows*, 8 B & C. 402.

² *Robinson v. Wilkinson*, 3 Pri. 638.

³ *Ex parte Hamper*, 17 Ves. 403.

Ex parte Matheas, 18 Ves. 125.

Ex parte Hodgkinson, 19 Ves. 294.

Ex parte Norfolk, *ibid.* 458; and see *Bisford v. Domett*, 4 Ves. 756.

⁴ *Ex parte Chuck*, Mont. 364.

457. 8 Bing. 469. 1 Mont. & S. 615.

⁵ *Dubois v. Ludert*, 1 Marsh. 246.

fine our attention to the rights of proof by a joint creditor against the joint and separate estates, either where a joint commission is issued against all the partners,—or where there are separate commissions, or a separate commission, against all or any of the partners. The rights of the joint, as well as of the separate creditors, are in each of these cases settled and arranged by the general order of Lord Loughborough,¹ which has been the rule commonly referred to for determining the right of proof against the joint and separate estates.

By this order it is, amongst other things, directed, that the commissioners cause distinct accounts to be kept of the joint estate, and also of the separate estate or estates; and in case there shall be any overplus of the separate estate or estates, after all the separate creditors shall be paid and satisfied their whole demands, it shall be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts.²

In all commissions, too, against one or more of the partners of a firm, it is now enacted, by the 62nd section of the new statute, that a *joint creditor* shall be entitled to prove his debt under each commission; but for the purpose only of voting in the choice of assignees, and of assenting to, or dissenting from, the certificate.³ And he is declared to be not entitled to any dividend out of the *separate estate*, until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be the petitioning creditor in a commission against one member of a firm; in which last case, indeed, he is then considered as a *separate creditor*.⁴ This section only applies to a partnership subsisting at the time of the bankruptcy.⁵

But a joint creditor of a joint-stock banking company may prove the amount of his debt under a separate fiat against one of the members of the company, for the purpose of voting in the choice of assignees, &c., notwithstanding, previous to the issuing of the fiat, several of the members may have become bankrupt, and have died.⁶ And a party is considered as a continuing member of the company, until he executes a

¹ 8th March, 1794.

² And see *ex parte Baudier*, 1 Atk. 98. *Ex parte Oldknow*, 1 C. B. L. 233. *Ex parte Cobham*, *ibid.* 234.

³ The former practice was to allow the joint creditors, upon petition, to prove for the purpose of assenting to, or dissenting from, the certifi-

cate; but they were not permitted to vote in the choice of assignees.

⁴ *Ex parte Hall*, 9 Ves. 349. *Ex parte Ackerman*, 14 Ves. 604. *Ex parte De Tastet*, 1 Rose, 10. 17 Ves. 247.

⁵ *Ex parte Morris*, Mont. 218.

⁶ *Ex parte Marston*, 4 Dea. 191.

legal transfer of his shares, and a fresh return is sent into the stamp office, notifying the change of ownership.¹

The enactment of the 62nd section accords in some measure with the old rule, as to the right of proof against the joint and separate estates. That rule, though acted upon in principle by Lord Hardwicke, was abandoned on many occasions by Lord Thurlow, who, when there were *no joint effects*, permitted joint creditors to prove under separate commissions, and to receive dividends rateably with the separate creditors.² And in other cases (without advertg to the consideration whether there were any joint effects or not), when the justice of the case required it, he allowed the same proof, declaring that debts, whether sole or joint, ought to be paid out of a bankrupt's estate; which, in the case of a partnership, he observed, was composed of his separate estate, and of his moiety of the³ joint estate. And the principle he acted upon was this—that a joint creditor should not be deprived by a commission of bankruptcy of the rights, which he possessed at law against the separate estates, as well as against the joint estate. For, if a joint creditor of several partners had brought an action against all, he might have taken out separate executions against each; and, therefore, a commission of bankruptcy—being an execution for all the creditors, and preventing him from suing out his execution at law with effect—ought to be considered (at least) as beneficial an execution for *him*, as for any other creditor of the bankrupt. But this principle was entirely departed from by Lord Loughborough, whose decision has been subsequently followed by Lord Eldon; and it is now a settled rule, that a joint creditor is not entitled to receive dividends from a separate estate—if there is *any* joint fund (however small in amount) or any solvent partner—until the separate creditors are paid 20s. in the pound.⁴ If the joint property, however, be of such a nature and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or (in point of expense) an unwarrantable attempt,—such a case, it has been admitted, would authorize a departure from the rule, on the ground that there would then be in truth no joint property.⁵ And so, where the only joint

¹ Ex parte *Prescott*, 4 Dea. 253.

² Ex parte *Haydon*, 1 C. B. L. 234.

³ Ex parte *Hodgson*, 2 Bro. 5. Ex parte *Page*, *ibid.* 119. Ex parte *Flintum*, *ibid.* 120. Ex parte *Copland*, 1 C. B. L. 236.

⁴ Ex parte *Clay*, 6 Ves. 813.

Ex parte *Sadler*, 15 Ves. 52. Ex parte *Taitt*, 16 Ves. 193. Ex parte *Peake*, 2 Rose, 54. In re *Lee*, *ibid.* note. Ex parte *Leaf*, 1 Deac. 176.

⁵ Ex parte *Peake*, 2 Rose, 54, per Lord Eldon.

effects were such as were pledged for more than their amount; for in this case it was likewise considered, that there were *no joint effects* under the administration of the assignees to distribute.¹

¹ Ex parte *Hull*, 2 N. R. 191 a. The exclusion, in bankruptcy, of joint creditors from a share of the separate property, bears no analogy to proceedings at law, which give a joint creditor the right to come (under an execution) at once against the separate estate of his joint debtor, as well as against the joint estate, until he has satisfied his debt. The propriety of such exclusion, too, seems somewhat difficult to be supported; for, as Sir W. Evans has justly observed, (Evans' Bankrupt Stat. 211,) it should be recollected that the credit obtained by a partnership is often founded, not so much upon a consideration of the capital, which may be supposed to be invested in the concern, as upon the known personal opulence of the several individuals who compose it. And the above rule, of not permitting joint creditors to prove against the separate estate, if there is *any* portion of joint property, however small the amount, it must be confessed, is often inconsistent in its operation, and productive of great injustice when carried to the extent to which it sometimes is. And see Lord Eldon's observation in *ex parte Pinkerton*, 6 Ves. 814, note (a.) For instance, if the joint effects amount only to 1*l.* 11*s.* 6*d.* (ex parte *Peake*, 2 Rose, 54,) the joint creditors are refused permission to take dividends under any of the separate estates before the separate creditors are paid 20*s.* in the pound; whilst, if there should happen (fortunately for the joint creditor) to be not a farthing of joint property, he is then permitted to receive from every one of the separate estates an equal dividend with every separate creditor. Mr. Christian, in his *Treatise on the former Bankrupt Laws* (vol. ii. 36), as well as Sir William Evans, in his

Letter to Sir Samuel Romilly, very ably demonstrate the inconsistency of the rule, and the absurd consequences which follow from too strict an adherence to it. As suppose a case, where there are five partners, each having a separate estate of 20,000*l.*, and separate debts to the same amount, and the joint debts amount to 100,000*l.*—if there should be only 10*l.* worth of joint property, this would be all that could be divided among the joint creditors until the separate creditors are paid in full; a joint creditor of 20,000*l.* would, therefore, not get a farthing in the pound, while the separate creditor to the same amount would receive the whole of his debt. On the other hand, if there should be no joint estate, then each joint creditor would be admitted to prove against every separate estate, and would accordingly receive 3*s.* 4*d.* in the pound from *each* separate estate, amounting to 16,666*l.* 18*s.* 4*d.* in the whole,—while each separate creditor would receive only 3*s.* 4*d.* in the pound from *one* estate, amounting but to 3333*l.* 6*s.* 8*d.* So that from the mere circumstance of there being *no joint effects*, the joint creditors would get five-sixths, and the separate creditors but one-sixth of their debts.

A more equitable mode of distribution is suggested by Mr. Christian and Sir William Evans (Evans' Bankrupt Statutes, 211); namely, that as each partner ought to pay his own private debts, and his proper share of the joint debts,—and the effects he has to pay withal are his separate estate, and his share of the joint estate;—every joint creditor ought, therefore, to be allowed to prove a *just portion of his debt* under each partner's estate, and take a dividend with the separate

Where A. and B. dissolved their partnership, A. retiring from the concern, and B. continuing the business under another firm, on which occasion A. assigned his moiety of the partnership effects to B., who agreed to indemnify him against the partnership debts; and at the time of the dissolution, A. and B. owed a joint debt of 1270*l.* to C., who continued to deal with B. without any rest in the account until B.'s bankruptcy; it was held that this sum could not be proved under the separate fiat against B., as there was no satisfactory evidence that there was no joint estate, nor that C. had accepted B. as his separate debtor.¹ But if C. had accepted the continuing partner as his separate debtor, then he could have proved under the separate fiat against B.²

Where, under special circumstances, an order is obtained by the joint creditors to prove against separate estates—and they prove against one or more of them exclusively of the rest—if any joint property is afterwards realized, the estates so burdened by the proof are entitled to be reimbursed out of such joint property, to the extent of the proofs made against them, before such joint property is divisible between the separate estates.³

If there is a *solvent partner*, though there may be no joint property, the joint creditor is in this case not permitted to prove under a separate commission against the bankrupt partner, on the ground that this would materially affect the interests of the separate creditors.⁴ For, as Lord Loughborough observed, if after so proving his debt, a joint creditor was to receive a dividend of 10*s.* in the pound, the assignees of the bankrupt partner would have no claim against the

creditors from the aggregate of the separate estate, and the share of the joint. But since every partner must not only pay his own share, but is a surety for the other partners—accordingly, if there is a surplus in any instance of this aggregate fund, then, that the surplus ought to be applied to the benefit of the joint creditors, to make up the deficiency which they may experience by the dividends of the other partners. Whatever system, however, of proof or distribution might be adopted, it is submitted, that the lord chancellor possesses an equitable jurisdiction in bankruptcy quite sufficient to enable him to depart occasionally from any general rule,

convenient as it may be in ordinary practice, when too rigorous an observance of it would work manifest absurdity and injustice. And as several exceptions and departures from the above rule have been already admitted to prevail, (only one of which, it may be remarked in passing, is noticed in the 62nd section of the new act,) a still further relaxation of it on the principle acted on by Lord Thurlow, might, it is apprehended, be attended with considerable advantage.

¹ Ex parte *Appleby*, 2 Dea. 482.

² Ex parte *Bradbury*, 4 Dea. 202.

³ Ex parte *Willock*, 2 Rose, 392.

⁴ Ex parte *Kensington*, 14 Ves.

447. Ex parte *Kendall*, *ibid.* 449.

solvent one; as the solvent partner would in that case be entitled to set-off, as against them, the other moiety of the debt, which he himself might have paid to the creditor. But, in case the creditor first sues the solvent partner, and recovers the whole debt against him, the latter could then come in as a separate creditor of the bankrupt, to the amount only of a *moiety* of the debt—for he could have recovered only a moiety of the debt against his co-partner if he had continued solvent;—a circumstance which, it will be readily perceived, occasions a great difference in the fund divisible amongst the separate creditors.¹ The above rule, it has been decided, is not confined to cases of *partners*, but applies to co-contractors generally.²

Where, however, the solvent partner is *abroad* and not likely to return, and there is no joint property—a joint creditor, in such a case, will be permitted to prove under a separate commission, for the purpose of receiving dividends;³ and where there is *no solvent partner at the time* when the joint creditor applies to prove, such proof will be also admitted, notwithstanding there was a solvent partner at the time of issuing the commission.⁴ And it is not a sufficient reason for expunging a proof by a joint creditor against the separate estate, that there was a partner actually solvent at the time it was made, if he became insolvent shortly afterwards.⁵ A joint creditor may also prove against the separate estate, where there is no joint estate, and no solvent partner, notwithstanding the estate of a deceased partner may be solvent.⁶ But it has been determined that the *mere insolvency* of the co-partner, or his having applied to take the benefit of the insolvent act,⁷ does not entitle the joint creditor to prove upon the separate estate of the other partner; the principle being that, whilst there is any other fund, however small, to resort to, the joint creditor cannot prove against the separate estate of the bankrupt partner; and there being no reason, as was sug-

¹ *Ex parte Elton*, 3 Ves. 240. Sir Wm. Evans points out the injustice of this rule, as it affects the solvent partner. "The subjecting," he says, "one partner to a loss, for which he is not originally liable, merely for the sake of giving the creditors of the other the distribution of a greater property than actually belongs to the person, to whose rights they have succeeded, cannot be reconciled with any prin-

ciple of reason or justice." See *Evans' Bankrupt Statutes*, 215.

² *Ex parte Field*, 3 M. D. & D. 95. *Ex parte Buckingham*, 1 M. D. & D. 235, *contra*.

³ *Ex parte Pinkerton*, 6 Ves. 814; and see *ex parte Machell*, 2 V. & B. 216.

⁴ *Ex parte Jones*, 1 Mont. Dig. 238.

⁵ *Ex parte Bauerman*, 3 Dea. 476.

⁶ *Ibid*.

⁷ *Ex parte Morris*, Mont. 318.

gested in this case, because a man is insolvent, that he may not still be able to pay a considerable portion of his debts.¹

Where a creditor has an equitable mortgage on the estate of a bankrupt partner for a partnership debt, he is entitled to an order for the sale of his equitable mortgage, although he cannot prove for the residue of his debt, for the purpose of receiving dividends, if there is a solvent partner.²

Where several firms are engaged in a joint adventure, to which there is no joint property appertaining, the creditors of the adventure must prove against the separate estates of the different individuals, and not against the estates of the different firms.³ But this decision has been since overruled by Lord Eldon, who held that the creditors of the adventure might prove against the joint estates of the minor partnerships.⁴

Upon the issuing of a separate commission against one of several partners,—as it frequently happens that the assignees possess themselves of the partnership property, the lord chancellor will (upon the petition of the joint creditors) after the choice of assignees, order distinct accounts to be kept of the joint and separate estates; and that what shall be found to belong to the bankrupt in respect of his share and proportion of the *partnership estate*, shall be applied by the assignees in the first place towards satisfaction of the *partnership creditors*; and that what shall belong to the *separate estate* of the bankrupt shall be applied, in like manner, in the first place, towards satisfaction of the *separate creditors*.⁵

Where partnership property, also, was supposed to have been taken under the separate commission, joint creditors were then allowed to come in; and, in two instances, they were permitted to vote in the choice of assignees.⁶

A joint creditor (who is the *petitioning creditor* under a *separate commission*) has the privilege of election, either to make his proof against the separate, or the joint estate,⁷ although he may have, in addition to his joint debt, a distinct separate debt, sufficient to support the fiat.⁸ On the other hand, by suing out a *joint commission*, he

¹ Ex parte Janson, 3 Mad. 229. Buck, 227.

² Ex parte Lloyd, 3 Dea. 305.

³ Ex parte Wylie, 2 Rose, 393.

⁴ Ex parte Nolte, 2 G. & J. 295.

⁵ Ex parte Aspinwell, 1 C. B. L. 247. Ex parte Meroy, *ibid.* Ex parte Hill, *ibid.* Ex parte Thomas, *ibid.* Formerly the application must have been made by bill, unless the petition was consented to.

Ex parte Vogel, 1 Atk. 132. Hankey v. Garratt, 3 Bro. 457. 1 C. B. L. 244, 247.

⁶ Ex parte Jones, 18 Ves. 283.

Ex parte Taylor, *ibid.* 284.

⁷ Ex parte Hall, 9 Ves. 349. Ex parte Ackerman, 14 Ves. 604. Ex parte De Tasset, 1 Rose, 10. 17 Ves. 247.

⁸ Ex parte Burnett, 2 M. D. & D. 357.

binds himself to resort to the joint property. But where a joint creditor sued out two separate commissions against two partners,—and proved under one against the joint estate, and received a dividend,—he was held not to have concluded himself to prove as a joint creditor against the other partner; but that, on refunding the dividend with interest, he might still prove as a separate creditor under the commission against such other partner.¹ Where, however, a joint creditor sues out a commission against A., “as *surviving partner* of B.” he can then only prove against the joint estate.² And a joint creditor, having joint property of two bankrupts in pledge, and selling the same after their bankruptcy, may nevertheless prove the remainder of his debt against the separate estates of both the bankrupts, if there is no other joint property.³

Where a joint creditor has a separate security from one of two partners for the joint debt, he may prove the amount of his debt, without the sale of his security;⁴ but not where the subject of the security is the joint property of the two partners.⁵ And in like manner, where a separate creditor of one partner has a separate security from the other for his debt, he may prove his whole debt against the separate estate, and retain his security against the other partner.⁶

Where there are no separate debts, or where the joint creditors will consent to pay all the separate creditors 20s. in the pound, they will then be admitted to prove their debts under a separate commission for the purpose of receiving dividends.⁷ But a mere offer to pay the separate debts will not be sufficient, without some proof before the court⁸ as to their amount.

If a trustee will suffer his co-trustee to detain a sum of money belonging to the trust estate, they are both severally liable; and if both become bankrupt, the debt may be proved against each⁹ of the estates.

Where L., one of three partners, contracted to sell to D. one hundred shares in a joint-stock bank, which were the property of the firm, and agreed, in consideration of D. accepting a bill, drawn by L. and Co., for the amount of the

¹ Ex parte Bolton, 2 Rose, 389.
¹ Buck, 7. Ex parte Crisp, 1 Atk.
 134; and see Heath v. Hall, 4 Taunt.
 326. Young v. Hunter, 16 East,
 252.

² Ex parte Barnard, 1 G. & J. 309.

³ Ex parte Geller, 2 Mad. 262.

⁴ Ex parte Bowden, 1 D. & C.
 135.

⁵ Ex parte Connell, 3 Dea. 201.

⁶ Ex parte Rodgers, 1 D. & C. 38.

⁷ Ex parte Chandler, 9 Ves. 35.

Ex parte Hubbard, 13 Ves. 424.
 Ex parte More and ex parte Thomas,
 cit. ibid.

⁸ Ex parte Taill, 16 Ves. 193.

⁹ Keble v. Thompson, 3 Bro.

purchase-money, to cause the shares to be duly transferred to D.; and the bill was negotiated by L. and Co., who became bankrupt before application could be made to the bank to transfer the shares to D., when the bank refused to make the transfer, claiming a lien on the shares for their own advances; it was held that D. could not prove against the separate estate of L. for money had and received, but only against the joint estate of L. and Co.¹

Though a partner withdraws the monies of the partnership for his separate use, yet if he openly and duly enters the sum so withdrawn in the partnership books, this is not such a fraud as will entitle the joint creditors to prove against his separate estate; otherwise, if by the entries of the books he disguises the transaction, or wholly omits or conceals it.²

Judgment of outlawry against two of three joint debtors does not make the debt a separate one, as against the third debtor; and it cannot be proved³ under his separate commission.

SECTION V.

Of Proof by SEPARATE CREDITORS under a Joint Commission.

The *separate creditors* under a *joint commission* are not permitted to come in *directly* upon the joint estate; they may, however, prove for the purpose of assenting to or dissenting from the certificate, but have no right to receive dividends of the joint property until all the joint creditors have received 20s. in the pound. The rights of the separate creditors are (like those of the joint creditors, which we have considered in the preceding section,) more particularly defined by the general order of Lord Loughborough,⁴ before referred to; by which it is directed, that in a joint commission against two or more bankrupts the commissioners may admit the proof⁵ of any separate debts of any one or more of such bankrupts, and such separate creditors shall be at liberty to assent to or dissent from the allowance of the certificate of the bankrupt, of whom they shall be

¹ Ex parte *Raleigh*, 3 Dea. 160.

² Ex parte *Smith*, 1 G. & J. 74.

³ Ex parte *Dunlop*, Buck, 253.

⁴ 8th March, 1794.

⁵ The practice was formerly to

let in the separate creditors, upon petition, to prove their debts under the joint commission, they paying contribution to the charge of it.

1 C. B. L. 232.

separate creditors. Distinct accounts are also ordered to be kept of the separate estates, as well as of the joint estate; and what shall be found to belong to the separate estates is to be applied, in the first place, towards satisfaction of the debts of the respective separate creditors. And in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, the respective shares of the bankrupts in such overplus are to be carried to the account of their respective separate estates, and be applied towards satisfaction of their respective separate debts. This arrangement was formerly made upon *petition* in each particular case; but it is now, in pursuance of this order, done by the commissioners. The costs of taking the accounts are directed to be paid out of the separate estates, and to be settled by the commissioners, in case the parties differ about them.

Under this order, where a firm of four persons became bankrupt, three of whom carried on a distinct business under a different firm, the creditors of the latter firm were held entitled to prove against the distinct estate of the three, without any special order; such a case being within the meaning, though not the words, of the general order.¹

Where two partners agreed to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment,—which was, however, witnessed by the other partner—and the money was afterwards entered in the cash-book of the partnership,—Lord King, upon petition, directed the obligee in the bond to be admitted a creditor against the joint estate.² So, where a creditor lent money to two of the members of a partnership upon the joint notes of the two partners, and upon their separate bonds,—and the whole of the money was applied to the use of the partnership (which consisted of them and several others), and the partners all agreed to consolidate the separate debts, and to consider them as the debts of the entire partnership,—Lord Thurlow, upon petition, permitted the creditor to prove the whole amount against the joint estate of the partnership.³ But where a sole trader became indebted by bond, and then took in a nominal partner, and some time afterwards a joint commission was issued,—the separate creditor in this case was not permitted to prove against the joint estate. If, however, any interest had been paid upon the bond by both

¹ Ex parte *Worthington*, 3 Mad. 26.

² Ex parte *Brown*, 1 Atk. 225.

³ Ex parte *Cloues*, 2 Bro. 595.

partners, they would then have been considered to have adopted the debt, and the partnership would have been liable to it.¹ But where A., being indebted to several persons, entered into partnership with B., and brought his stock in trade into the partnership—and by the articles between them it was agreed that the joint trade should pay the creditors of A. named in a schedule,—Lord Eldon held that a separate creditor of A. (though named in the schedule) did not, in the absence of all evidence of any assent on his part to such agreement, become a joint creditor of A. and B., and could not, therefore, prove against their joint estate.²

Where a creditor, having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint estate, and did not discover, till seven months afterwards, that they were bought on the separate account of one of the partners; it was held that he might transfer his proof from the joint to the separate estate.³

Where H. deposited with W. Virginia bonds for 50,000 dollars, which W. pledged for his own debt, and afterwards took in C. as a partner, when the chief part of the bonds were redeemed by W. and C., and were afterwards pledged by them for a partnership debt, and H. had subsequent dealings with W. and C. until their bankruptcy, but had no notice of the way in which his Virginia bonds had been disposed of; it was held that the subsequent dealings of H. with the partnership of W. and C. did not deprive him of his right to prove the amount of the bonds against the separate estate of W.⁴

If one partner (being a trustee) brings trust-money into the trade, *without the knowledge* of his co-partner, it cannot be proved as a joint debt; for, though the partner abuses his trust by advancing the money to the partnership, it will not raise a contract between the partnership and the *cestui que trust*.⁵ But where one of several partners, who was also one of several trustees of certain stock, forged the names of his co-trustees to a power of attorney empowering his co-partners to sell the stock, which was accordingly done, and the produce was paid into the banking-house of the

¹ Ex parte Jackson, 1 Ves. jun. 131.

⁴ Ex parte Meinartzhagen, 3 Dea. 101.

² Ex parte Williams, 1 Buck, 13.

⁵ Ex parte Apsey, 3 Bro. 265.

³ Ex parte Vining, 1 Deac. 555.

partners,—though the other partners had no knowledge of the forgery, and the criminal partner was the chief conductor of the concerns of the partnership,—yet it was held that the money so received by the banking-house constituted a joint debt due from them to the trustees; for that no ignorance on the part of any of the partners, even supposing all but the criminal partner to have been ignorant of the facts (which could not have been),—nor any neglect on the part of the house arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the trustees were no parties, could deprive the trustees of their right to the money.¹ Neither can money borrowed by one partner to pay for an estate, but applied by him to pay partnership debts, be proved by the lender against the joint estate.² But where one of two partners applied trust-money for the purposes of the trade, *with the privity* of the other partner, both in that case were held liable to make good the trust-money; and though they afterwards dissolved their partnership, and the partnership effects were assigned over to the first, who took on him the payment of the debts, this was held to be no discharge of the other partner.³ So, where one of three partners died intestate, leaving a widow and infant children—and his widow administered, and agreed with the surviving partners that her late husband's share of the partnership property should continue in the firm (of which she constituted one with them) for a term of years, and the firm became bankrupt,—Lord Eldon held, that though the administratrix committed a breach of trust by continuing the money in the trade, yet as the *partners knew* that a certain proportion of the property belonged to the children, they held the money as debtors to the children, and as if it had been placed with them by way of direct loan; and that though the children might have proved against the separate estate of their mother (if it had been for their benefit to do so), they might equally prove against the partners, who had possessed themselves of the property of the infants under circumstances raising a clear assumption.⁴ And indeed generally, when any partner (being a trustee of funds) makes use of them for partnership purposes *with the knowledge* of the other partners, or where with common

¹ *Stone v. Marsh*, 6 B. & C. 551.
² 1 Ry. & M. 364. *Ex parte Bolland*,
 Mont. & M. 315. *Hume v. Bol-*
land, Ry. & M. 371.

³ *Ex parte Wheatley*, 1 C. B. L.
 537.

⁴ *Smith v. Jameson*, 5 T. R. 601;
 and see ante.

⁵ *Ex parte Watson*, 2 Ves. & B.
 414.

diligence they might have known the fact,¹ the *cestui que trusts* may prove against the joint estate.²

Where a broker insured with an underwriter, who underwrote separately but had partners—and the broker kept an account with the partnership,—the court held that the proof could not be made against the joint estate (an insurance with a partnership being then prohibited by the 6 Geo. 1, c. 18,³) but the debt was ordered to be proved against the separate estate.⁴

SECTION VI.

Of Proof by Creditors holding Joint and Several Securities; and herein of the Creditor's ELECTION to prove against the Joint or Separate Estates.

A creditor, who has a joint and several security, may come in either against the *joint*, or the *separate*, estates; but he must make his *election*, for he cannot prove against both estates at the same time. And this accords with the well-known rule of law as to the right of action of a joint and several creditor; viz. where several obligors are jointly and severally bound, the obligee must either sue them all jointly, or each of them separately,—but he is not allowed to do both.⁵ If, however, a joint creditor has a separate security from one of his co-debtors, he may prove his debt against the joint estate without the surrender or sale of his security,⁶ and *vice versâ*.⁷ But where two partners, who were tenants in common of certain property, mortgaged it for a joint debt, this was held to operate, not as a separate security from each, but as a joint security, which was ordered to be sold, and the proof limited to the difference.⁸ And although the joint and several security is by two distinct and independent instruments, the creditor is not entitled to double proof against the joint and separate estates.⁹ Where also the creditor has *no notice* that the bankrupt has a *dormant partner*, he may (as we have before seen) make his election

¹ *Marsh v. Keating*, 1 Bing. N. C. 198. *Stone v. Marsh*, 6 B. & C. 551; and see ante, 691.

² Ex parte *Heaton*, Buck, 386.

³ This restriction has been lately repealed by the 5 Geo. 4, c. 114.

⁴ Ex parte *Angerstein*, 1 Bro. 399. Ex parte *Lee*, *ibid.* 400.

⁵ 1 Saund. 153, n. 1 *ibid.* 291, e.

Bac. Ab. Obligation, D. 4 Poph. 161. 2 Burr. 1290. 2 Vin. Ab. 68. pl. 7.

⁶ Ex parte *Peacock*, 2 G. & J. 27.

⁷ Ex parte *Rodrig*, *ibid.*

⁸ Ex parte *Plummer*, 2 M. D. & D. 204.

⁹ Ex parte *Free*, 2 G. & J. 250.

¹⁰ Ex parte *Hill*, 2 Dea. 249.

to come in, either as a joint or separate creditor.¹ So, where a creditor had a *joint bond* of two partners, which by *mistake* was omitted to be made *joint and several*, and there appeared to have been a clear intention of the parties that the liability should be *several*, as well as *joint*,—the creditor (under a joint commission issued against the parties) was permitted to prove the bond against the separate estate of either partner.²

Where A. employed B. and C. as his stockbrokers, and, for the purpose of more convenient transfer, allowed certain stock belonging to him to stand in the name of B. alone, who, without the consent or knowledge of A., sold the stock, and paid the produce into the partnership funds of B. and C., who afterwards became bankrupt; it was held that A. was entitled to prove either against the separate estate of B., or against the joint estate, as he might think fit.³ Notwithstanding a creditor, having thus a right of election, has proved against one estate, yet if the other estate should leave a surplus beyond the payment of its own debts, he may then come in for a share of such surplus in right of such part of his debt as remains unsatisfied;⁴ though, after electing to go against the *joint estate*, he has no claim of preference to the other joint creditors upon the surplus of the *separate estate*.⁵

But where B. and C., being indebted to A., gave him a joint and several bond, and also (as part of the same security) a joint warrant of attorney, upon which he entered up judgment; it was held that the bond was merged in the judgment, and that A. could only prove against the joint estate of B. and C.⁶

The creditor, before he elects, is entitled to a reasonable time⁷ to examine into the accounts of the two estates. He also has, under particular circumstances, been permitted to prove against both estates, and defer his election till a dividend is declared;⁸ and even where he has received a dividend upon one estate, he has been allowed to change

¹ Ex parte *Hodgkinson*, 19 Ves. 294.

² In re *Bate*, 3 Ves. 400. In re *Freeman*, *ibid.* 401, note.

³ Ex parte *Turner*, Mont. & M. 255.

⁴ Ex parte *Rowlandson*, 3 P. Wms. 405. Ex parte *Parmenter*, cit. 1 Atk. 99. Ex parte *Banks*, 1 Atk. 106. Ex parte *Bond*, *ibid.* 98. Ex parte *Blankenhagen*, 1 C.

B. L. 249. Ex parte *Hay*, 15 Ves. 4. Ex parte *Masson*, 1 Rose, 159.

⁵ Ex parte *Bevan*, 10 Ves. 107.

⁶ Ex parte *Christy*, 2 D. & C. 155.

⁷ Ex parte *Butlin*, 1 C. B. L. 250.

⁸ 1 C. B. L. 250. Ex parte *Husbands*, 2 G. & J. 4. Ex parte *Kedie*, 2 D. & C. 321.

his proof, upon refunding the dividend received;¹ though if a dividend has been made upon the other estate against which he seeks to prove, the court will not permit that dividend to be disturbed by reason of such change of proof.² And where a creditor has once proved against one estate, he will not be permitted, without special grounds, to retire from his proof, and to prove against the other estate.³

But if the creditor has done any act in the character in which he has already proved, he will in general be considered to have made a conclusive election. As, where he had signed the certificate as a joint creditor, he was holden not entitled afterwards to alter his proof;⁴ and so, where he was a party to a petition in the character of a joint creditor, it has been thought that that was an objection to the transfer of proof. Lord Eldon, however, held, upon appeal, that he was not concluded by this circumstance.⁵ And where a debt was due to bankers on the balance of account, and part was covered by the joint promissory notes of the bankrupts, and the whole by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for payment of the whole balance, and part of the debt had been proved by the bankers against the joint estate,—it was held that they were entitled to prove a portion of the residue against the separate estate of one of the bankrupts.⁶ But where a joint and several creditor proved his debt under a separate commission against one of two partners, and received a dividend, and also signed his certificate—and afterwards brought a joint action against the solvent partner and the bankrupt—Lord Eldon held that the creditor, having made his election to proceed severally, by proving the bond under the commission against the bankrupt, was not at liberty to bring a joint action upon it, but that he must proceed against the solvent partner separately.⁷ Where, however, a joint creditor had sued out two separate commissions, under one of which he proved against the joint estate, and received a dividend, being ignorant of his right to prove against the

¹ Ex parte Rowlandson, 3 P. Wms. 409. Ex parte Bond, 1 Atk. 98. Ex parte Bentley, 2 Cox, 218. Ex parte Bolton, 2 Rose, 389. Ex parte Law, 3 Dea. 541.

² Ex parte Bidley, 18 Ves. 70.

³ Ex parte Dixon, 2 M. D. & D. 312.

⁴ Ex parte Knott, 1 Mont. Dig. 244.

⁵ Ex parte Husbands, 2 G. & J. 4.

⁶ Ex parte Ladbroke, 2 G. & J. 81.

⁷ Bradley v. Millar, 1 Rose, 273.

separate estate of the other,—he was held not to have conclusively elected to prove as a joint creditor; but that, upon refunding the dividend with interest, he might prove¹ as a separate creditor. And a joint and several creditor by bond, who proves against the separate estate of one of the obligors, is not concluded by taking afterwards an *additional joint security* from all the obligors, but is still entitled to elect.²

Where the creditor has no election.] Where three partners were indebted jointly, and entered into a covenant, by which they promised, on *demand*, jointly and severally to pay the debt, but it was expressly stipulated “that any debt existing previous to such demand should remain a debt in like manner as if no covenant had been entered into for payment thereof;” and no demand was made previously to the bankruptcy of the partners; it was held that the debt was only proveable against the joint estate.³

But where a partnership debt is secured by a joint and several covenant of two partners, the creditor may prove the amount against the separate estate of one of the partners, without relinquishing his joint security.⁴

There are some exceptions, however, to this rule of election so imposed on a creditor holding a joint and several security, which, indeed, are more particularly applicable to the holders of bills of exchange, and will require some attention to be properly understood.

First. Where there are *distinct firms*, and the *holder is ignorant*, at the time he takes the bill, that they are all engaged in one general partnership: in this case, if any one firm draws upon another—whether the aggregate firm upon the minor firm, or *vice versa*—the holder, it has been settled, may prove against both estates, namely, the estate of the general partnership, as well as that of the minor firm.⁵ But this right does not seem to extend to the case of an *individual* partner separately trading, but to be confined to cases where there is not only a plurality of trades, but a plurality of partnerships; so that it is only where the double

¹ Ex parte *Bolton*, 2 Rose, 389. Ex parte *Swanzy*, Buck, 7; and see ex parte *Dixon*, 2 M. D. & D. 312.

² Ex parte *Hay*, 15 Ves. 4.

³ Ex parte *Fairlie*, Mont. 17. Ex parte *Lancaster Canal Company*, Mont. 27.

⁴ Ex parte *Shepherd*, 2 M. D. & D. 204.

⁵ Ex parte *La Forest*, 1 C. B. L. 251. Ex parte *Bombonus*, *ibid.* Ex parte *Benson*, *ibid.* Ex parte *Adam*, 2 Rose, 36.

security involves a second *joint* estate, that double proof can be allowed.¹ Therefore, where a firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government; and the bills not being paid, process of insolvency issued against the foreign firm, and a commission of bankruptcy against the English partner; it was held that the agent might prove under the commission, but not to receive dividend, unless he elected not to prove under the insolvency abroad.² And it has also been subsequently decided, that though the holder *had notice* of the joint interest of two different firms on a bill, who were engaged in a joint adventure, yet that he was entitled to prove the bill against both estates.³

Secondly. Where the parties on the bill are *not distinct firms*,—that is to say, where no member of a partnership carries on trade on his separate account, and one of the partners draws upon the general firm, or the general firm upon the individual partner:—in this case, if the holder of the bill, at the time he took it, *had notice* that the different parties on it were included in one general partnership (notwithstanding he procures the separate indorsement of one of the partners on the bill, for the express purpose of raising a contract for a double security), he cannot prove against both the joint and the separate estates, but is put to his election;⁴ because, as Lord Eldon has justly observed, where the object appears to be to give the bill a character of respectability by this distribution of the names of a partnership, a party to such an arrangement ought not to avail himself of it, against *his knowledge* of the method in which the obligation of the firm ought regularly⁵ to be created. If the holder is in perfect ignorance of the identity of the parties, and *bonâ fide* conceives them to be distinct houses of trade at the time he takes the bill, then it would seem consistent with the principle of the above decisions, that he should be allowed to prove against both estates. But in a late case, where A. and B. were in partnership, B. being a secret partner, and A. on the partnership account drew bills in his own name on B.,—

¹ Ex parte *Moult*, 1 Deac. & C. 44. 2 Id. 419. S. C. Mont. 321. Mont. & B. 28. Quære, whether there is any sound reason for this distinction.

² Ex parte *De Mattos*, 1 M. & A. 345.

³ Ex parte *Walker*. Ex parte

Wenslay, 1 Rose, 441; and see Lord Eldon's observation, 8 Ves. 346.

⁴ Ex parte *Bigg*, 2 Rose, 37. Ex parte *Bank of England*, 2 Rose, 82. Ex parte *Laur*, 3 Dea. 541.

⁵ 2 Rose, 38.

Lord Eldon held that the holder of these bills (though he was ignorant of the partnership) was not entitled to prove them against the joint estate, and also against the separate estate of B.; but that he was only entitled to prove them against each of the *separate* estates.¹

In some cases, where the creditor has a right of proof originally against both estates, he may forfeit such right by his own *laches*, or by his own deliberate election to come only against one. In one case where, after proving against the joint estate, the creditor laid by for some time without proving against the separate one, and acted as a joint creditor by joining in a petition with other joint creditors,² the late vice-chancellor thought that he was concluded; but Lord Eldon, upon appeal, held the contrary.³ But where A. held a bill drawn by C. and Co. upon B. (who was a member of that firm, as well as a third person who was an infant)—but A. was ignorant of these circumstances,—and separate commissions being taken out against B. and C. (the infancy of the other partner excluding a joint commission)—an order was made under each commission for keeping distinct accounts of the joint and separate estates, and A. proved his debt against the joint estate under each commission, and received dividends under each;—it was held, that as A. had modelled his proof, not as against the liability of the parties arising from the contract of the bill, but upon his right to include or exclude the resort to a dormant partner, he had made a deliberate and *conclusive* election to resort to the joint funds alone, and could not, in addition to the two proofs he had already made, prove also against the separate estate of B.⁴

Where two partners dissolved their partnership, one continuing the business and covenanting to pay the joint debts, —and afterwards a joint commission issued against them;—the joint creditors, who had not (previous to the bankruptcy) accepted the continuing partner as their sole debtor, were held not to have an election to prove against the separate estate of the continuing partner, but to have only a right to

¹ *Ex parte Husbands*, 2 G. & J. 4.

² *Ex parte Husband*, 5 Mad. 421. From the marginal abstract of this case, it would seem as if all that it decided was, that the creditor had simply a right of election; but the report of it expressly states, that there were two distinct firms, and

that the creditor was ignorant of the general partnership.

³ *Ex parte Husbands*, 2 G. & J. 4.

⁴ *Ex parte Liddel*, 2 Rose, 34. For a very able and accurate examination of the cases relating to the doctrine of election, see Mr. Eden's Treatise on the Bankrupt Law, 170, et seq.

prove against the joint estate; notwithstanding what was the joint stock of the two, under the circumstances of the case, became the separate estate of the continuing partner.¹

But where A., B., and C. dissolved their partnership, A. and B. agreeing to pay all the partnership debts, and D., a creditor of the old firm, ignorant of the terms of the dissolution, applied for payment, and drew a bill on the three, which was accepted by A. and B., in the name of the old firm, without C.'s authority; it was held that D. had the option to treat it either as the debt of the three, or of the two, and might prove the amount under a joint fiat against A. and B.²

Where A. sold goods to B., and other goods to C., and B. and C. joined in a note for the whole, A. was allowed to prove against the separate estate of each, on giving up the joint note.³

And where a joint-stock banking company made advances to a bankrupt's firm, on the security of shares in the bank, which stood in the separate names of the two partners, in compliance with the rule of the company, that no shares should be held jointly, but which the partners agreed should, nevertheless, be considered partnership property; it was held that the company could not prove the amount of their debt against the joint estate, without deducting the value of the shares.⁴

T. (who was in partnership with M. and F., and also carried on a separate trade,) being indebted to K. 100*l.* on his separate account, sent him a bill of exchange for 300*l.*, that wanted two months of becoming due, indorsed by T., M., and F., (but not by T. in his individual character,) and requested K. to give him credit for the 100*l.*, and to send him a bill for the remainder of the 300*l.*,—K. accordingly gave him credit for the 100*l.*, and sent him a banker's check for 200*l.*, which was duly paid,—the bill for 300*l.* was dishonoured, and T., M., and F. became bankrupts:—under these circumstances, Lord Eldon held that the transaction must be considered as an exchange of paper, and that K. had no right of election in his proof upon the bill, nor any right to prove for any part of the 300*l.* against the separate estate of T.⁵

Where a joint and separate creditor sues out a separate

¹ Ex parte *Freeman*, Buck, 47. Ex parte *Fry*, 1 G. & J. 96; and see ex parte *Fell*, 10 Ves. 347. Ex parte *Williams*, ante, 656.

² Ex parte *Liddiard*, 4 D. & C. 603.

³ Ex parte *Lobb*, C. B. L. 250.

⁴ Ex parte *Connell*, 3 Dea. 201.

⁵ Ex parte *Kirby*, Buck, 511.

commission against one partner, and afterwards another creditor sues out a joint commission, the first commission will not be superseded in favour of the last, without securing all the rights of the joint and several creditor to prove under the joint commission, and elect between the joint and separate estates; and he will be allowed also to elect, out of which estate he will be paid the costs of superseding the first commission.¹

SECTION VII.

Of Proof between Partners, and different Firms composing one general Partnership.

Although one partner may be a creditor of another, and may (under certain circumstances) enforce his claim against him both at law and in equity, notwithstanding the partnership, yet in bankruptcy it is now a settled rule that a solvent partner cannot prove under a commission against his co-partner, so as to come in competition with the creditors of the partnership,²—that is, that he has no right to receive any portion of his debt until all the creditors of the partnership are paid 20s. in the pound, as well as all interest due upon their respective debts subsequent to the date of the commission.³ The above rule is founded on this plain principle of reason and justice, viz. that a partner, who is himself liable to all the creditors of the partnership, ought not to take any of the funds, before all the creditors (to whom he is so liable) are duly paid.⁴

¹ Ex parte *Brown*. Ex parte *Munton*, 1 V. & B. 60. 1 Rose, 443. Ex parte *Smith*, 1 G. & J. 256.

² Ex parte *Burrell*, C. B. L. 532. Ex parte *Parker*, *ibid.* Ex parte *Pine*, *ibid.* Ex parte *Broome*, 1 Rose, 69. Ex parte *Ellis*, 2 G. & J. 312.

³ Ex parte *Reeve*, 9 Ves. 588. Ex parte *Robinson*, 4 D. & C. 499. Ex parte *May*, 3 Dea. 382.

⁴ Though the partner cannot prove for the purpose of receiving dividends, he is, however, at liberty to enter a claim for the amount of his demand. Ex parte *Broome*, 1 Rose, 69. But this case has been subsequently overruled by Lord Eldon, who has decided that a partner cannot even claim against

the separate estate before payment of the joint debts. Ex parte *Carter*, 2 G. & J. 233. Ex parte *Ellis*, *ibid.* 314. And it seems to be a question undetermined, whether he has not strictly a right to prove, with a reservation of his right to receive dividends until the taking of the partnership accounts—though the practice of the commissioners is not to permit such proof. The arguments in favour of the proof are, 1st. That the demand of the partner is an equitable debt; 2ndly. That it is a debt within the 52nd section of the new act; and, 3rdly. That the partner would be barred by the certificate of his co-partner. And see 1 Mont. Dig. 245.

Therefore, where two partners give a joint promissory note for money lent to the partnership, and one becomes bankrupt, and the solvent partner after the bankruptcy is obliged to pay the note, he cannot prove for a moiety of the note; for he is not a surety for the bankrupt partner, but the two partners are principal debtors or co-sureties.¹

And where all the partners become bankrupt the same rule is adopted as to the proof between the different estates, though it is in this case frequently more difficult of application, and does not seem to be altogether founded upon quite so sound a principle. It appears, however, to be established by the modern decisions, that not only is the separate estate of one partner prevented from claiming against the joint estate of the partnership in competition with the joint creditors,² but that the joint estate, also, is not permitted to claim against the separate estate in competition with the separate creditors.³

There are some cases, however, which have been held not to come within the above rule; there are others which are exceptions to it. Thus, where A. agreed that B. should share A.'s profits of a concern of which he was a member; it was held that B. had a right of proof against A.'s estate for the half of A.'s profits.⁴ And where A. being a dormant partner with B., dissolved the partnership, when B. was declared to be indebted to A. in a certain balance, and A. sued B. for the balance, and received from him a cognovit for the debt and costs; it was held that A. was entitled to prove his debt against the estate of B., although some of the partnership debts were unpaid.⁵ So, where upon the death of one of three partners, his executors carried on the business with the two surviving ones for a twelvemonth longer, and then dissolved the partnership, upon which occasion the two continuing partners gave the executors a bond to secure the balance due to them, and more than six years afterwards the two became bankrupt; it was held that the executors

¹ *Ex parte Porter*, 4 Dea. & C. 774.

² Lord Hardwicke, however, was of opinion, that if one of two bankrupt partners had lent money to the partnership, then that his separate creditors had a right to a dividend upon this, in common with the joint creditor. *Ex parte Hunter*, 1 Atk. 327. C. B. L. 534.

³ *Ex parte Grill*, C. B. L. 534. This point, however, was decided differently by Lord Talbot. *Ex parte Blake*, C. B. L. 533. *Ex parte Batson*, *ibid.* 534.

⁴ *Ex parte Dodgson*, Mont. & M. 445.

⁵ *Ex parte Gruzebrook*, 2 D. & C. 186.

had a right to prove the amount of the bond against the joint estate of the two continuing partners.¹

The only exceptions to this general rule seem to be, *first*, where money or effects have been *fraudulently abstracted* from one estate and applied for the benefit of the other;² and, *secondly*, where some of the members of a partnership form an entirely distinct firm, carrying on a *different trade* from that of the general partnership, and where the articles of one trade have been furnished by one firm to the other.³

And *first*, where money or effects have been *fraudulently abstracted* from one estate to benefit the other.

This question, it will be perceived, involves the consideration of innumerable transactions, each depending on its own peculiar circumstances; and the question will always be, whether or not the transaction amounts to a case of fraud. It has, however, been decided, that where one partner takes the property of the partnership fund, and applies it to his own use *without the knowledge* of the other partners, and to the prejudice of the partnership estate, this is such a case of fraud as falls within the exception to the rule; and that the assignees, on behalf of the joint creditors, may consequently prove the amount of the sum so abstracted against the separate estate.⁴ And the same, although the money may be afterwards retained by such partner with the knowledge of the others, but under circumstances from which their subsequent approbation cannot be inferred.⁵ The term *fraud*, indeed, (as Lord Eldon has observed,) is used in a sense to distinguish the transaction from a taking by contract or loan, or from a taking with the express or implied authority of the other partners.⁶ And with respect to the principle of the above exception, he upon another occasion remarks, that it is against conscience that the creditors should resist the restoration of that which the debtor (from whom they seek payment) has against the consent of his partners, and in fraud of their contract,⁷ taken out of the

¹ Ex parte *Hall*, 3 Dea. 125.

² Ibid.; and see ex parte *Lodge*, 1 Ves. jun. 166. Ex parte *Cust*, C. B. L. 535.

³ Ex parte *Sillitoe*, 1 G. & J. 374; and see ex parte *Williams*, 3 M. D. & D. 433.

⁴ Ex parte *Cust*, supra. Ex parte *Lodge*, supra. And see ex parte

Turner, 1 M. & A. 54, 357; 4 D. & C. 169; as to the right of proof by the joint estate for fraudulent abstraction.

⁵ Ex parte *Watkins*, Mont. & M. 57.

⁶ 2 V. & B. 213.

⁷ Ex parte *Yonge*, 3 V. & B. 35.

joint fund. In the event, too, of a surplus of the joint estate, then the separate creditors of the partner who has been defrauded, will have a right to such surplus, in preference to the separate creditors of the partner committing the fraud. Thus, where it appeared that a debt had been proved against the joint estate, in respect of bills drawn by one partner in the name of the firm for his own separate debt, it was determined, that his share of the surplus of the joint estate was subject to the lien of the separate estate of the other partner, in preference to his own separate creditors; and not only so, but that if such surplus proved insufficient to satisfy the balance due from the one estate to the other, then that the separate creditors of such other partner might come in against the separate estate of the partner (so drawing the bills) for the deficiency.¹

The *solvency* of either of the partners, also, will not prevent the exercise of the same right of proof, as the joint creditors would have had if both had become bankrupts. Thus, where two solvent partners, after the bankruptcy of their co-partner, were compelled to discharge a debt against the partnership (which he had created by his own fraud), and had also paid all the joint debts of the partnership, they were permitted to prove the amount of this debt under the commission against their bankrupt partner; Lord Eldon observing that the solvent partners might have filed a bill to compel the other to replace money so fraudulently obtained,—that this right could not be taken from them by the bankruptcy of their co-partner,²—and that, in every fair and equitable understanding of the respective situations of parties, the solvent partners were to be considered as the separate creditors of the bankrupt partner. And even at law it has been held, that where a solvent partner had paid money to another before his bankruptcy, for the specific purpose of being paid over as his liquidated share of a debt to their joint creditor,—and the money had been misapplied by the bankrupt partner,—the solvent partner could prove the amount under the commission.³ In December, 1818, A., B., C., and D. dissolved partnership by deed, by which it was agreed that A. and B. should retire, and the business be carried on by C. and D., who covenanted to indemnify A. and B. against all outstanding demands. In October, 1825, C. died, and a commission issued against D., A. having

¹ *Ex parte King*, 17 Ves. 115.

² *Wright v. Hunter*, 1 East,

³ *Ex parte Young*, 2 Rose, 40. 20.

3 V. & B. 35.

been obliged to pay certain partnership debts which C. and D. had undertaken to indemnify him against. Held, he might prove for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution¹ in 1818. So, where there happens to be a surplus of the joint estate under a *separate commission*,—if, upon taking the partnership accounts, the bankrupt is found indebted to the solvent partners in respect of the transactions of the partnership, the solvent partners are also entitled to such surplus towards discharging such debt; and if it turns out insufficient, then they are at liberty to prove against the separate estate of the bankrupt partner for the difference.²

But, notwithstanding one partner may abstract the partnership money without the privity or subsequent approbation of his co-partner, yet if the latter, by his own conduct, enables him to do so—such as by conceding to him a full dominion over the funds, contrary to the express provision of the articles of partnership—this is a case which does not come within the above exception. Thus, where the articles of partnership between two partners provided, that the money belonging to the concern should be lodged in the hands of a banker in *their joint names*—and one partner permitted the other to pay in the partnership monies, and draw them out from time to time in *his own separate name*,—Lord Eldon held this to be such an acquiescence of one partner in what necessarily gave the other the whole control over the joint property, that he must abide by the consequence of his own conduct; and, therefore, though the money might have been taken by the other partner for his own purposes, without the privity or subsequent approbation of his co-partner,—yet the facts, by which the partner was so enabled to possess himself of it, being facts within the knowledge and approbation of the co-partner, the *consequence* of those facts must also be taken to have been within his knowledge, and with his privity and approbation.³ But where one partner was entrusted and empowered by the other, *pursuant to the articles of partnership*, to draw bills and manage the cash concerns of the co-partnership;—this was held to be not such an acquiescence in his dominion over the partnership funds, as would prevent the above right of proof from attaching against his estate for a debt, which he had created against the partnership, by pledging the credit and using the notes and name of the partnership for his own

¹ Ex parte *Carpenter*, 1 Mont. & M. 1.

² Ex parte *Terrell*, Buck, 345.

³ Ex parte *Harris*, 1 Rose, 437. 2 V. & B. 210; and see ex parte *Smith*, 6 Mad. 2.

purposes, without the consent of the other partners.¹ The right of proof also in this case was held by Lord Eldon to be sustainable on another ground, viz., under the provisions of the 49 Geo. 3, c. 121, s. 8, and consequently under those also contained in the 52nd section of the new act; for he observed, that the solvent partners having paid all the joint debts, though they were not strictly sureties, were nevertheless in the situation of "*persons liable*," and, as such, entitled to prove against the bankrupt partner. And this right of proof by a solvent partner, who has paid all the partnership debts, or indemnified the bankrupt's estate against them, has also been recognized in several other cases.²

When joint creditors have, under an order on the ground of there being no joint property, proved against one or more of the separate estates exclusively of the rest, the estate so burthened is entitled to remuneration from the others.³ And where bankrupts were bound jointly and severally to the Crown, and the joint estate had paid beyond its due proportion, contribution was decreed between the joint and separate estates.⁴

Where a solvent partner pays all the joint debts, and proves against the separate estates of his bankrupt co-partners, for the respective sums each is bound to contribute,—it has been a question whether, if the estate of one of the bankrupts is insufficient to pay 20s. in the pound, the solvent partner can come against the other bankrupt's estate for his proportion of that deficiency, besides the original contributory proportion already proved against his estate. It has been holden by the present vice-chancellor, that this cannot be done; but that the solvent partner can only prove for such sum, as *at the time of the bankruptcy* each partner was bound to pay or provide—on the principle, that proof is equivalent to payment, without regard to the amount of the dividend—and also that proof cannot thus be mounted upon proof.⁵ Some doubts, however, have been entertained as to the correctness of this decision—Lord Eldon observing, with respect to proof being equivalent to payment, that that position has been frequently overruled.⁶ And when this case (*ex parte Smith*) came before him on appeal, he held that proof is only payment

¹ *Ex parte Young*, 2 Rose, 40. 3 V. & B. 35.

² *Ex parte Ogilvy*, 3 V. & B. 133. *Wood v. Dodgson*, 2 M. & S. 195. *Ex parte Watson*, Buck, 449. *Ex parte Taylor*, 2 Rose, 175. See also 9 Ves. 590. 2 V. & B. 212.

³ *Ex parte Willock*, 2 Rose, 392. *Ex parte Wyllie*, *ibid.* 393.

⁴ *Rogers v. Mackenzie*, 4. Ves. 752.

⁵ *Ex parte Watson*, Buck, 449. *Ex parte Smith*, *ibid.* 492.

⁶ *Ex parte Hunter*, Buck, 566.

when it produces payment,¹ and reversed the order of the vice-chancellor. Lord Eldon said that he took it to be clear, that if A. have two partners, and he pay more than his share, and one of his partners is insolvent, that insolvency is a mischief in which the other partner must partake, as well as he who seeks to prove.² But if one partner only indemnifies the joint estate against the claims of the joint creditors, and does not actually pay the joint debts, *or pay part in satisfaction of the whole*, this will not entitle him, under the 6 Geo. 4, c. 16, s. 52, to prove against his co-partner.³ And Mr. Eden appears to think that the equitable principle applicable to cases of principal and surety was not sufficiently attended to in the above decision.⁴ But it must be remembered, that though the solvent partner is in the nature of a surety to third persons for his co-partners, yet his co-partners are not respectively bound for *each other* as sureties to him—except, indeed, for so much only as each may be bound to contribute, in *proportion to his own share* in the partnership, for any loss occasioned to the *general concern* by the default of another. With this exception, each partner is only liable to the others for his own acts and defaults, and not for the acts and defaults of any one of his co-partners. Accordingly, when there are more than two partners, if one proves entirely insolvent, his share of the debts must be paid by the other partners, each bearing his due proportion of the loss occasioned by the insolvency of their co-partner. Thus, if A., B., and C. are partners, and there is a deficiency of 30,000*l.*, and C. be wholly insolvent, if A. pay the whole of such deficiency, he is entitled to prove 5000*l.* against B., B. having the benefit of proof of 5000*l.* against C.⁵ On the other hand, if two of three partners become bankrupt, and one of the estates of the bankrupt partners pays but a small dividend on the amount of his contributory share due to the solvent partner, the latter ought not to prove for the whole of the deficiency against the estate of the other bankrupt partner, but only for so much as that other bankrupt partner would have to contribute towards making good such deficiency, if he had continued solvent; otherwise, indeed, the estate of the bankrupt partner would be charged with a most unreasonable burthen for the indemnity of the solvent partner.⁶

¹ Ex parte Moore, 2 G. & J. 166.

² Ibid., 173.

³ Ibid., 2 G. & J. 166.

⁴ Eden's B. L. 168.

⁵ Per Lord Eldon, 2 G. & J. 173.

⁶ The proposition contended for

by the counsel for the petition in ex parte Watson (supra), viz., "that if one partner pay more than his share of the partnership debts, he may recover the amount so paid, against any one of the other mem-

Secondly. Where some one or more of the members of a partnership form an entirely distinct firm, carrying on a *different trade* from that of the general partnership, and where the articles of *one trade* have been furnished by one firm to the other.¹

In this case there are several points of distinction, which it will be of importance to attend to. In the first place, the *trades* must be *wholly distinct and different from each other*, and not merely branches of the joint concern; for, if there be in reality only one partnership, arranging different concerns belonging to them all in different ways for the benefit of the whole joint concern, there cannot in this case be proof by part against the other part. Thus, where three partners carried on the business of cotton manufacturers in Lancashire, and two of them had a branch establishment in London,—it was held that there could not be proof by the estate of the three against that of the two. But if the trades had been perfectly *distinct*, such as those of *cotton manufacturers* and *ironmongers*, then the three might have been creditors upon the separate concern of the two.² So, where A. and B. were partners as insurance brokers, and A. carried on a separate trade as an oilman, in the progress of which he became indebted to the firm,—the assignees of the joint estate were admitted as creditors upon the separate estate.³

So, where a firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign firm, and process of insolvency issued against the foreign firm, and a fiat against the English partner; it was held that the agent might prove under the

bers of the firm," is, certainly, quite untenable. As, suppose three partners interested in equal shares, two of whom become bankrupt, and the solvent partner pays the whole of the joint debts, amounting to 1500*l.* He comes for contribution against both the bankrupt partners, and proves against the estate of each a debt of 500*l.* One of the bankrupts pays only a dividend of 1*s.* in the pound, upon which the solvent partner applies to prove the deficiency, viz. 475*l.*, against the estate of the other bankrupt partner. If he is permitted to do so, and that bankrupt partner pays 20*s.* in the pound, the solvent partner will by that means receive

from one of his co-partners the whole of the loss occasioned by the default of the other, without having contributed one farthing himself; a consequence so manifestly absurd, as induces one to suppose there must be some inaccuracy in the report of the argument in the case above referred to.

¹ Ex parte Cook, Mont. 228.

² In re *Shakeshaft*, C. B. L. 538. Ex parte *Hurgreaves*, 1 Cox, 440. Per Lord Eldon, 11 Ves. 414. Ex parte *Ring*, C. B. L. 538. Ex parte *Freeman*, *ibid.* Ex parte *Johns*, *ibid.* Ex parte *Heslam*, 1 Rose, 146. Ex parte *Castell*, 2 G. & J. 124.

³ Ex parte *St. Barbe*, 11 Ves. 413.

fiat, but so as not to receive dividends, unless he elected not to prove under the insolvency abroad.¹

Where the bankrupt was one of the proprietors of a joint-stock banking company, and had failed to pay the amount of a further call upon his shares, it was held that the company had no right of proof for the amount of such call, before an account was taken of the debts and credits of the partnership.²

In the next place, though a joint trade may prove against a separate trade, yet it has been held that *one of two partners*, though carrying on a separate trade, and furnishing goods as a separate trader to the partnership, cannot prove under a commission against his co-partner; that is, not before all the joint creditors are paid the whole of the principal and interest on their respective debts. For in none of the cases (as Lord Eldon has observed) in which the partner, constituting a distinct house, has ever been admitted to prove, has the estate (against which he has been so admitted) been liable with that distinct house for joint debts;—the principle being, that a solvent partner shall not be admitted to prove in competition with creditors who have a demand against himself.³

Lastly. The consideration for the debt must be for goods sold, that is, for *articles of one trade* furnished to the other trade, and *not for money* advanced by one of the firms to the other. Therefore, where the debt accrued from the aggregate firm to the separate trade, in respect of monies provided for the aggregate firm, on the credit of the indorsement of the separate firm,—Lord Eldon held, that in this case no proof could be made by the separate firm against the aggregate one,⁴ as this could not be considered a transaction between trade and trade. But in a subsequent case, where the question was, whether an aggregate firm of five partners, carrying on the business of bankers, could prove against the estate of the minor firm of four, (who were engaged in the same, but a distinct trade, at a different place,) the amount of the balance arising out of dealings between the two firms in respect of their banking transactions, Sir John Leach held that such proof could be made, within the principle of *Ex parte Sillitoe*, as the dealing of the one firm with the other was in the way of their respective trades.⁵ But where two of three partners, who were iron-masters, carried on a distinct trade as bankers, but were not the ordinary bankers of the aggregate firm, made

¹ *Ex parte Mattos*, 1 M. & A. 345.

² *Ex parte Snape*, 4 Dea. 164.

³ *Ex parte Adams*, 1 Rose, 305.

⁴ *Ex parte Sillitoe*, 1 G. & J. 374.

Ex parte Cook, Mont. 228.

⁵ *Ex parte Castell*, 2 G. & J. 124.

advances to the aggregate firm at different periods for the purpose of relieving it, when it was in a state of difficulty and pressure, and under such circumstances as to lead to the inference that the advances would not have been made, had not the bankers been partners in the iron business; it was held that these advances could not be considered as dealings between trade and trade, and consequently that the firm of the two could not prove against the firm of the three.¹

Where there were three firms commencing at different periods,—upon the bankruptcy of the firm in which they were all engaged, distinct accounts were ordered to be kept of the different partnerships, as well as of the respective separate estates of each individual bankrupt.² But where there have been various partnerships, and a joint commission is taken out against one firm, in which some of the parties were not engaged, there can only be the common order for keeping distinct accounts of the joint and separate estates.³

And where B. was a partner with A., as nail-manufacturers, and with C., as grocers, and the firm of B. and C. advanced monies to the firm of B. and A., it was held that, as B. and C. were not liable for the debts of B. and A., B. and C. could prove under a fiat issued against B. and A.⁴

¹ Ex parte *Williams*, 3 M. D. & D. 431.

³ Ex parte *Parker*, 1 C. B. L. 249.

² Ex parte *Marlin*, 2 Bro. 15.

⁴ Ex parte *Thompson*, 3 D. & C. 612.

CHAPTER XVI.

OF RELATION TO THE ACT OF BANKRUPTCY.

- SECT. 1. *As to Payments made by or to the Bankrupt.*
2. *As to Purchasers.*
3. *As to other Dispositions of the Bankrupt's Property.*
4. *As to Executions and Attachments.*
5. *As to Notice of an Act of Bankruptcy.*
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SECTION I.

As to Payments made by or to the Bankrupt.

The alterations made by the statutes 6 Geo. 4, c. 16, and 2 & 3 Vict. cc. 11 and 29, in the law of relation to the act of bankruptcy, by which all dispositions subsequently made of the bankrupt's property were (under the 13 Eliz. c. 7,) avoided and overreached, have now rendered much of the doctrine which formerly appertained to this division of the bankrupt law, unimportant for consideration. It may suffice to observe, that after the hardship of the earliest of the above enactments had been relaxed by many subsequent statutes,¹ it was still sufficiently oppressive to be designated by judges from the bench² as an *odious law*;—and it was also one which they always refused to let a party take advantage of *upon motion*. The new statutes will be found to have relaxed the law of relation still further; and whether such relaxation has gone far enough remains to be considered, and will depend upon what construction courts of justice will give to their enactments. These it may be convenient to discuss in the order above mentioned; and, instead of enumerating in the gross the various alterations in this branch of the law, it will be better, perhaps, to point them out singly to the reader, as they occur in the progress of the inquiry,—by which means it will be more clearly perceived in what respects the new law differs from the old.

By 6 Geo. 4, c. 16, s. 82, all payments really and

¹ 1 Jac. 1, c. 15, s. 14; 19 Geo. 2, c. 32, s. 1.

² *Clarke v. Ryall*, 1 Bl. 642; and see 4 Taunt. 198. Per Mansfield, C. J.

bonâ fide made by the bankrupt, or any person on his behalf, before the date and issuing of the commission, to any creditor (such payment not being a fraudulent preference of such creditor), are declared to be valid, notwithstanding any prior act of bankruptcy—as well as all payments in like manner made to the bankrupt; and such creditor will not be liable to refund the same to the assignees, provided the person so dealing with the bankrupt had not (at the time of the payment by or to the bankrupt) notice of any act of bankruptcy by such bankrupt committed.¹ This section, it has been decided, operates retrospectively.² And the protection has been extended by the act 2 & 3 Vict. c. 29, s. 1, to all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat, against him. It has been said, however, that this statute does not comprehend a mere payment by a bankrupt to a creditor after an act of bankruptcy, but that such payment is still governed by 6 Geo. 4, c. 16, s. 82.³

This relation to the act of bankruptcy cannot, of course, be carried further back than the accruing of the petitioning creditor's debt; for the assignees could not avail themselves of any act of bankruptcy *beyond that time*, without destroying their title as assignees.⁴

And although the 6 Geo. 4, c. 16, s. 19, prevents a prior act of bankruptcy from vitiating the commission, yet this does not give the assignees any additional rights under it, so as to invalidate a transaction, *bonâ fide* in other respects, by mere relation to the act of bankruptcy.⁵

The payment by the bankrupt to a creditor is not confined now to a payment “in respect of goods sold, or of a bill of exchange, in the usual and ordinary course of trade,” (as was formerly held under the 19 Geo. 2, c. 32,) in order to be protected;⁶—for those words (which were inserted in that act) are purposely omitted in the above section, which extends to all *bonâ fide* payments whatever. It must still, however, be strictly a *bonâ fide* payment; and therefore a payment in any mercantile dealings, which is not in the ordinary course of trade, would not even now be considered a payment *bonâ fide*

¹ And see *Shaw v. Batley*, 4 B. & Ad. 801.

² *Terrington v. Hargreaves*, 5 Bing. 469.

³ *Turquand v. Vanderplank*, 10 M. & W. 180; and see post, 735.

⁴ Ex parte *Birkett*, 2 Rose, 71. Ex parte *Bowman*, 2 M. & S. 479.

⁵ *Ward v. Clarke*, 1 Mood. & M. 497.

⁶ *Bradley v. Clark*, 5 T. R. 197. *Vernon v. Hall*, 2 T. R. 648. *Pinkerton v. Marshall*, 2 H. B. 334. *Harwood v. Lomas*, 11 East, 127. *Bayly v. Schofield*, 2 M. & S. 338. Ex parte *Congallon*, 3 Bro. 47. *Tamplin v. Diggins*, 2 Camp. 312. *Blogg v. Phillips*, *ibid.* 129.

—such, for instance, as a payment made for goods *before they are delivered*¹—or, perhaps, a payment by weekly instalments for goods previously sold and delivered to the bankrupt.²

But a payment, made on the verge of bankruptcy, to a creditor, who is aware of the insolvency, is valid under the 6 Geo. 4, c. 16, s. 81, if no commission issue till more than two months after the payment; for the doctrine of fraudulent preference in payments only applies now to cases within two months of the commission.³ Whenever a payment is made after an act of bankruptcy, the burthen of showing that it is a *bonâ fide* payment is cast upon the receiver.⁴

The payment, also, which is contemplated by the act, must be a payment by the *bankrupt himself*, or his *authorized agent*. Therefore, a payment made by a *third person* without the knowledge of the bankrupt—or a payment extorted by compulsion of legal process (by foreign attachment, for example, even after judgment,) from a *third person*, who happened to have effects of the bankrupt in his hands at the time—cannot be said to be a payment *by the bankrupt*, or by a person on his behalf, when the bankrupt was not even conscious that his property was in the hands of such third person.⁵

So, a payment by a *partner* who has committed an act of bankruptcy of a partnership debt, to a creditor who has notice of the bankruptcy, is not protected by the 82nd section; for the agency of the partner over the joint property was destroyed by his bankruptcy.⁶

The indorsement and delivery of *bills of exchange* by the bankrupt to a creditor after a secret act of bankruptcy, where the creditor received the money due on the bills before the commission issued, was held by Lord Hardwicke to be a *good payment* within the statutes of 1 Jac. 1, c. 15, and 19 Geo. 2, c. 32,—on the ground, that there was no difference between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange (provided the money was received on them before the commission issued)—such indorsement being only a *medium* of payment.⁷ So, the acceptance of a bill (which is afterwards duly paid) is equivalent to a payment of the debt in money at the time⁸ of the acceptance. And the giving goods in exchange for other goods was also held by Lord Kenyon to be good⁹ as a payment.

¹ Per Bayley, J., 3 B. & C. 416.

² *Bolton v. Jager*, 1 Ry. & M. 265.

³ *Tucker v. Barrow*, 1 M. & M. 137. ⁴ 3 Car. & P. 85. ⁵ 7 B. & C. 623. See *Tusquand v. Vanderplank*, 10 M. & W. 180.

⁶ *Bagnall v. Andrews*, 7 Bing. 223.

⁷ *Hovil v. Browning*, 7 East, 154.

⁸ *Craven v. Edmondson*, 6 Bing.

734.

⁹ *Hawkins v. Penfold*, 2 Ves. 550.

¹⁰ Per Abbott, C. J. *Sowerby v. Brooks*, 4 B. & A. 525.

¹¹ *Wilkins v. Carey*, 7 T. R. 713.

But where, after a secret act of bankruptcy by P., the defendant accepted a bill of exchange for him for 98*l.*, at three months, which P. paid away to a creditor standing by; and at a subsequent period in the course of the same day, P. agreed to sell the defendant four horses, as a security for 70*l.* of the 98*l.*, and the horses were subsequently delivered to the defendant, who paid the 98*l.* bill when it became due; it was held that the transaction was not protected by the 82nd section of the new act, for it amounted to nothing more than a sale of the horses with an agreement to set off the price against a by-gone debt, which set-off is agreed upon after a secret act of bankruptcy; and it would be dangerous to extend the doctrine of set-off, so as to give effect to a transaction of this nature.¹

So the delivery of goods by the bankrupt, upon a threat of arrest, was held not to be a payment within the 82nd section.²

The *bankers* of a bankrupt are in the same situation in regard to him, as other persons are in this respect; and if they receive money from him after notice of an act of bankruptcy, they are bound to retain it for the use of the assignees. And payments, therefore, made by them upon account of drafts drawn by the bankrupt, after they have had notice of an act of bankruptcy—or any payments of money over to the bankrupt himself—will not be protected; neither can they set off any payment so made, or be allowed to come in as creditors in respect of it under the commission.³

Where a bankrupt shortly before his bankruptcy drew a bill which he procured to be discounted, and then gave his creditor an order to receive the amount, directing the person who discounted the bill to transmit it to the creditor—and whilst the money was in the hands of the carrier, committed an act of bankruptcy;—it was held that the creditor (to whose hands the money did not come until after the act of bankruptcy) was liable to refund it to the assignees; for, whilst the money remained in the hands of the carrier, the property in it remained unaltered,⁴ notwithstanding the order to receive it was given to the creditor before the bankruptcy. And though this point would be ruled differently now, with respect to the relation to the *act of bankruptcy*,—yet the principle of the decision would apply to a case, where a

¹ *Carter v. Breton*, 6 Bing. 617.

³ Bro. 313. *Hammersley v. Purling*,

² *Smith v. Moon*, 1 Mood. & M.

³ Ves. 757.

458. And see *Bradbury v. Anderton*,

⁴ *Hervey v. Liddiard*, 1 Star.

1 Cr. M. & R. 486. 5 Tyrr. 152.

123.

³ *Vernon v. Hankey*, 2 T. R. 113.

creditor receives money under similar circumstances *after the issuing of the commission*. And yet in another case, where a trader gave an authority to a broker to receive rents from his tenants, and upon a creditor applying for payment of his debt, the trader directed the broker to pay the creditor out of the rents; and the broker not having received the rents, promised to pay the debt as soon as he received the amount from the tenants, *and after the issuing of a commission* against the trader, the broker paid the money to the creditor; it was held that the assignees could not recover the amount from the broker.¹ So, where a trader gave to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order, retained it until the assignees of the testator should enable him to pay simple contract debts, and the trader became bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader.²

A payment of a debt by the bankrupt upon being arrested,³ or threatened with an immediate arrest,⁴ is a *bonâ fide* payment within the statute, notwithstanding a secret act of bankruptcy. And where a prisoner obtained a day-rule to receive from an insurance office the amount of a loss by fire, and a creditor, knowing the day when the money was to be paid, pressed for, and obtained payment of his debt on the same day, and there was not any fraud, the payment was held to be protected by the 82nd section of the 6 Geo. 4, c. 16.⁵ But where a trader, upon being arrested and afterwards charged at the suit of several persons, sent for all the creditors at whose suits he was detained *except one*—and paid those creditors alone the full amount of their debts—such payments were not considered to be *bonâ fide*.⁶ And where a trader was arrested upon a *ca. sa.* after he had committed an act of bankruptcy—and thereupon placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the party at whose suit the bankrupt had been arrested;—this transaction was considered also to be not a *bonâ fide* payment.⁷ But where a party advanced money to a bankrupt during his imprisonment, for the express purpose of enabling him to settle with his cre-

¹ *Bedford v. Perkins*, 3 C. & P. 90.

² *Ex parte South*, 3 Swanst. 392.

³ *Cox v. Morgan*, 2 B. & P. 398.

Holmes v. Winnington, cit. *ibid.*

⁴ *Jones v. Lingard*, cit. *ibid.*; but see *Smith v. Moon*, Mood. & M. 458.

⁵ *Churchill v. Crease*, 5 Bing 178.

⁶ *Southey v. Butler*, 3 B. & P. 237.

⁷ *Allanson v. Atkinson*, 1 M. & S. 583.

ditors—and (that purpose failing) a part of the money was repaid to him by the bankrupt;—in this case, the money was held to be clothed with a specific trust, which prevented it from passing to the assignees; and consequently the repayment was protected.¹

And where the bankrupt, under a deed of composition with his creditors, which was entered into by him two months before his bankruptcy, and by which he agreed to pay them 10s. in the pound by two instalments, paid immediately to those who executed the deed the first instalment of 5s. in the pound, but as some of the creditors refused to come in under the deed, he was afterwards made a bankrupt; it was held that these payments were not made in contemplation of bankruptcy, but to prevent bankruptcy, and that the creditors might retain such payments, and prove for the balance of their debts.²

A payment by a tenant to a landlord to avoid a distress is a *bond fide* payment, even though the landlord knew of an act of bankruptcy; for, having by law a right of distress, if he thinks fit to waive that right and accept of the rent, he is not to be placed in a worse situation than if he had made an actual distress.³ And though there are no goods on the premises, such a payment by the tenant will be valid; as the landlord would have a right to distrain on any goods which might be subsequently placed there.⁴

A payment made by the bankrupt to a party who had a *lien* on papers in his hands for a balance due, which he delivered up on payment of such balance, was held to be a *bond fide* payment;—though the party did not expressly stipulate for payment as a condition for the surrender of the *lien*—and even though the party received such payment from the bankrupt in the King's Bench prison, where he was actually confined at the time—and the *lying in prison* was itself the act of bankruptcy on which the commission issued.⁵

Where a bankrupt, previous to an act of bankruptcy, gave a power of attorney to his creditor to receive sums of money due to the bankrupt, and to apply them to the creditor's own use,—any money received under such power by the creditor after the bankruptcy was held to be recoverable by the assignees.⁶

¹ *Coles v. Robins*, 3 Camp. 183.

⁴ *Mavor v. Croome*, 1 Bing. 261.

² Ex parte *Wood*, 2 D. & C. 508.

⁵ *Thompson v. Beatson*, 1 Bing.

And see *Gibson v. Muskell*, 3 Scott, N. R. 433.

145; but see post.

⁶ *Hovil v. Lethecliffe*, 5 Esp.

³ *Stevenson v. Wood*, 5 Esp. 200. 158.

Where the defendant, who was acceptor of a bill for the accommodation of the bankrupt, and for which the latter had undertaken to provide, received the day after an act of bankruptcy committed a sum to meet the bill in part; it was held, that being a party to the bill, and the payment *pro tanto* in his own discharge, the assignees were entitled to recover it back.¹

The relation to the act of bankruptcy, it seems, only affects payments and transactions by the bankrupt, which may operate to the prejudice of the assignees, or interfere in any manner with their rights; for in other respects the act of a man, who has committed an act of bankruptcy, has the same effect as the act of any other person.² Therefore where a bankrupt, having securities in his bankers' hands to a certain amount, drew upon them a bill for a *larger amount*, on the score of his accommodation—which (after acceptance, and after an act of bankruptcy) he indorsed to a third person;—it was held that the indorsee, though not entitled to recover against the bankers the whole amount of the bill—which would have prejudiced the right of the assignees to the amount of the securities held in the bankers' hands—might nevertheless recover to the extent of the difference between the amount of such securities and the amount of the bill.³

With respect to payments *to* a bankrupt—it is provided by 6 Geo. 4, c. 16, s. 84,⁴ (in addition to the 82nd section above mentioned,) that no person or body corporate, or public company, having in his or their possession or custody any money, goods, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order, provided such person or company had not notice that such bankrupt had committed an act of bankruptcy.

Payments made *to* a bankrupt after a *secret* act of bankruptcy depend, for their validity, upon the same principle as payments made *by* him; they must be equally *bonâ fide*, and in discharge of a debt or other legal liability. But there is a great distinction in reality between the effect (as it relates to the general creditors) of the invalidity of a payment *by*, and of a payment *to*, a bankrupt; that is, between a creditor losing the benefit of a receipt of money, and a debtor being

¹ *Guthrie v. Crossby*, 2 Carr. & P. 301.

² Per Lord Ellenborough, 12 East, 659.

³ *Willis v. Freeman*, 12 East, 656.

⁴ This section is taken from the 56 Geo. 3, c. 137, s. 1.

subjected to make a payment twice over. In the case of a payment to the bankrupt—that payment must, unless there be great misconduct on the part of the bankrupt, enure (by an increase *pro tanto* of the distributable fund) to the benefit of those very creditors who claim the second payment of the same debt; whereas a receipt from a bankrupt operates *pro tanto* in diminution of the distributable fund—and, so far as it extends, defeats the general object of the law, viz., an equal division among all the creditors.¹ Accordingly, where a party bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bond fide* without knowledge of the act, such a payment was held to be protected.² But the contrary has been subsequently held with respect to a payment made by a party who was not *actually indebted* to the bankrupt at the time, notwithstanding it was made in *anticipation* of a consignment of goods, which had been previously ordered of the bankrupt by the person making such payment.³ As the court, however, decided this last case upon the ground that the defendant (when he made the payment) was not “a debtor of the bankrupt” within the 1 Jac. 1, c. 15, s. 14,—and as those words are omitted in the 82nd section of the new statute, which extends generally to *all payments* really and *bond fide* made before the date of the commission,—it is probable, when a case of this kind comes again before the court, it would meet with a different decision.

But where a payment is made more in the nature of a general advance to the bankrupt, than in payment for any particular goods, then it will not be considered a payment in the course of business, nor within the protection of the 82nd section of 6 Geo. 4, c. 16.⁴

A fraudulent deed concerted between the petitioning creditor and the bankrupt, cannot be set up to invalidate a payment, although made after notice of the execution of the deed.⁵

Where money was paid to a bankrupt by a party, who had received it from the bankrupt's debtor, to convey to the bankrupt in the character merely of a messenger or bearer,—such a payment, it was held, could not be disputed by the

¹ Per Abbott, C. J., 4 B. & C. 531.

² *Cash v. Young*, 2 B. & C. 413.
Hill v. Farnell, 9 B. & C. 45. But
 see *Cannan v. Denew*, 10 Bing. 292;
 and *Cannan v. Wood*, 2 M. & W.
 465..

³ *Bishop v. Crawshaw*, 3 B. & C.
 415.

⁴ *Crowfoot v. London Dock Com-*
pany, 4 Tyrr. 967.

⁵ *Burbridge v. Watson*, 4 C. & P.
 170.

assignees as against such messenger or bearer, though he was aware that the bankrupt was in prison at the time.¹ And the same principle applies where an arbitrator, (in whose hands money had been deposited by the bankrupt,) before the commission issued, and without any knowledge of an act of bankruptcy, paid the money over to the person whom he thought entitled to receive it.²

Where a factor gave his acceptance after a secret act of bankruptcy of his principal (of which he had then *no notice*) for the amount of goods sold by him for his principal,—though the factor *paid* the acceptance to a third person *after notice* of the act of bankruptcy,—the payment was held to be protected; as it was to be considered a payment in reference to the *giving* of the bill, and not in reference to the time when it became *due*.³ And the same point was ruled at *nisi prius* before Lord Chief Justice Best. But where a clerk gave a check upon his employers for value received by them of the bankrupt, this was considered to be a *mere memorandum*, and not to relate back as a payment to the time when given, both the clerk and the employer having (before the check was paid) received notice of the bankruptcy of the person in whose favour it was drawn;⁴ and the check, therefore, was not such an obligation to pay, as to justify the payment after notice of an act of bankruptcy. But where the factor had *not sold the goods*, but had accepted and paid bills in respect of them after a secret act of bankruptcy of the principal,—in this case, the payment was held to be not a payment of an antecedent debt, but an advance of money—and therefore not protected, so as to prevent the assignees⁵ from recovering the goods in trover from the factor.

The act of bankruptcy by *lying in prison* (as we have before seen) was under the former law held to relate back to the day of the first arrest—or day of surrender in discharge of the bail—and to operate as if the arrest or surrender was in itself a *complete* act of bankruptcy. Consequently, where a payment was made to a trader in prison, with full notice of that fact—and with notice also from an attorney, that a commission would shortly be issued, and that the act of bankruptcy would relate back to the day of the imprisonment—and the requisite time to constitute an act of bankruptcy was

¹ *Coles v. Wright*, 4 Taunt. 198.

² *S. P. Tope v. Hockin*, K. B. Trin. T. 1827. 7 B. & C. 101.

³ 7 B. & C. 101.

⁴ *Wilkins v. Casey*, 7 T. R. 712.

⁵ *Bennett v. Spackman*, 1 Carr. N. P. 274.

⁶ *Spratt v. Hobhouse*, 4 Bing. 173.

⁷ *Copeland v. Stein*, 8 T. R. 199.

afterwards completed,—such a payment was held to be¹ not protected. But where the payment was made to an agent of the bankrupt, *without any knowledge* of the bankrupt being in prison,—in this case the payment was considered valid; though Lord Ellenborough observed, that if the party had *known the fact*, out of which the bankruptcy sprung, this would have deprived him of the protection of the statute.² Yet we have seen,³ that a payment *by* a bankrupt to a creditor was held good, though the creditor actually received the money from the bankrupt in the very prison where he was confined. And, indeed, it seems somewhat doubtful, for the reasons before stated in treating of this particular act of bankruptcy, whether it will now be held to relate back to the *first day* of the imprisonment.⁴ It is now decided that it does not.⁵ The same doctrine, however, as to the fraction of a day (which applies to other acts of bankruptcy) applies also to this; and accordingly, where the sheriff took possession under an execution, and at a later hour of the same day the bankrupt surrendered in discharge of his bail, the execution was holden valid.⁶ For the *very hour* of the day when a fact took place (as to all purposes connected with a right of property) may be properly inquired into; ⁷ though the parties are entitled to take the *whole day* into account, in calculating the period of the imprisonment, with a view to the⁸ act of bankruptcy.

When the act of bankruptcy consists in *escaping out of prison, or custody*, it is then expressly declared, by the fifth section of the new statute, to relate back to the time of the arrest, commitment, or detention.

A payment made to the bankrupt by *coercion at law*, before the execution of the commissioner's assignment, even with notice of an act of bankruptcy, has been always considered valid, unless fraud or collusion can be shown between the debtor and the bankrupt.⁹ And it is no defence against an action by the bankrupt, that he has committed an act of bankruptcy of which the defendant has notice, if no commis-

¹ *King v. Leith*, 2 T. R. 141.

² *Coles v. Robins*, 3 Camp. 183.

³ *Ante*, 729.

⁴ See *ante*, 77. *Tucker v. Barrow*, 1 M. & M. 137.

⁵ See *ante*, 77.

⁶ *Thomas v. Desanges*, 2 B. & A. 586.

⁷ And see *Godson v. Sanctuary*, 4 B. & Ad. 255.

⁸ Per Abbott, C. J., *Saunderson v. Gregg*, 3 Star. 72; and see *Sadler v. Leigh*, 4 Camp. 195. *Wydown's case*, 14 Ves. 87. *Glasington v. Rawlins*, 3 East, 407. *Ex parte Birkett*, 2 Rose, 71; and see *ex parte Farquhar*, 1 M. & M. 8.

⁹ *Pryn v. Beale*, 8 Keb. 230. *Andrews v. Spicer*, *ibid.* 616. *Foster v. Allanson*, 2 T. R. 479.

sion be actually sued out, nor any proceeding be instituted for that purpose.¹ But it has been held that a debtor of a bankrupt was not warranted in paying funds of the bankrupt's to a creditor (who sued the bankrupt in the mayor's court) upon an *attachment merely* against the debtor as garnishee,—for that he was not justified in paying over the money, *before judgment* had been obtained against him.² And even in a case where *judgment was obtained* against the garnishee, and he had paid over the money to the creditor, the creditor was held bound to refund to the assignees.³ Where a banker, however, who had in his hands a balance due to an insolvent trader, was served with different attachments by his creditors, and then held to bail in trover by the trader himself,—it was held that he was entitled to relief in equity on a bill of inter-

¹ See last references, and *Prickett v. Down*, 3 Camp. 131.

² *Windham v. Paterson*, 1 Star. 147; and see *Barker v. Goodair*, 11 Ves. 78. Sir Wm. Evans has made some very just and forcible observations on these decisions, in his note to the statute 1 Jac. 1, c. 15, s. 14, and in his Letter to Sir S. Romilly (p. 204). "It is impossible," he says, "to conceive a greater anomaly or absurdity than the law in this respect exhibits. In every other case, an action founded upon contract supposes the *actual breach of a previous obligation*, which it was incumbent on the defendant to perform; but in this case the action itself is rendered necessary, in order to render the party secure in the *performance of his duty*. From the expressions, too, thrown out in some of the cases, it would seem not sufficient for the defendant to express his readiness to make the payment demanded, but to require that, for his indemnity, an action should be *prosecuted to judgment*. As a payment *before judgment* might, therefore, be treated as collusive, perhaps a judgment by *default*, or *confession*, would not be regarded in a much more favourable light. And thus a party, perfectly willing to perform an engagement which can be legally en-

forced, is, without any default of his own, and from collateral circumstances which he has nothing to do with, subjected to the expense and inconvenience of a legal process, attended possibly with arrest and imprisonment, before he can satisfy with safety the claims which he is totally unable to resist. In common cases of conflicting claims, a person, who is willing to satisfy his obligation according to the right, may be released from becoming a party to a contest in which he has no concern, by means of a bill of interpleader; but in the case under consideration"—(which was not a proceeding by foreign attachment)—"there can be no such assistance; for the claim is all on one side, and there is no competitor who can be brought before the court." In order to apply the proper remedy to such a defective state of the law, he suggests that all payments, *although after knowledge of an act of bankruptcy committed*, should be protected if made *before a commission has actually issued*, unless the commission should be taken out within so short a period after the act of bankruptcy, as might be productive of a mere race between the commission and the payment.

³ *Horil v. Browning*, 7 East, 154; and see ante, 726.

pleader.¹ But it seems the better plan in such a case would have been, to pay the money into court in the action, which would have operated as a discharge at law, and would have prevented the necessity of a bill of interpleader.²

Where a debtor paid the amount of the debt to assignees under a commission, which was afterwards superseded—and the same assignees were appointed under the second commission,—the payment was held to be protected under the 46 Geo. 3, c. 135, s. 1, by the relation of the rights of the assignees, which were revested in them by the second commission, and which the defendant believed to exist when the payment was made.³

SECTION II.

As to Purchasers.

A much greater protection is now afforded to purchasers than by the 6 Geo. 4, c. 16, s. 81, which only provided that contracts should be valid, if made more than two calendar months before the date of the commission. But by the subsequent enactments of the 2 & 3 Vict. c. 11, s. 12, all conveyances by any bankrupt *bonâ fide* made and executed before the date and issuing of the fiat, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the party had not at the time of such conveyance notice of any prior act of bankruptcy. And by section 13, no purchase from a bankrupt *bonâ fide* and for valuable consideration, although the purchaser had notice at the time of such purchase of an act of bankruptcy, is impeachable, unless the commission⁴ against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

And by 2 & 3 Vict. c. 29, all *contracts, dealings, and transactions* by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of

¹ *Langston v. Boylston*, 2 Ves. jun. 101.

² *Ibid.*

³ *Davenport v. Carter*, 5 Moore, 16.

⁴ This word ought to have been "fiat;" but why a fiat should have been substituted for a commission by the 1 & 2 Will. 4, c. 56, it is not very easy to explain.

bankruptcy by such bankrupt committed; provided the party dealing with the bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed. But it is declared, that nothing in the act contained shall be deemed to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor, or to any execution founded on a judgment on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference.

On a commission issuing on May 14th, a dealing on March 14th is valid, as being more than two calendar months before the issuing of the commission.¹ So, a mortgage executed on February 18th, is valid against a commission issued on April 18th.² And generally where the computation of time is to be from an act done, the day when such act is done is to be included.³

In considering the above enactments, it is proposed, in the first place, to inquire more especially how they operate with regard to *purchasers*, distinguishing⁴ between purchasers *without notice* of an act of bankruptcy, and purchasers *with notice* of such act.

And *first*, as to purchasers *without notice*. Although a purchaser without notice of any prior act of bankruptcy is only protected (according to the strict construction of the above enactment) when the purchase is made more than two calendar months before the date and issuing of the commission;—yet, for the benefit of trade, when *goods or articles of merchandize* are *bonâ fide* bought of a trader, though less than two months before the issuing of a commission against him, and after he had committed an act of bankruptcy—if the goods are paid for in the ordinary course of trade, without knowledge of the bankruptcy, such a purchase cannot be impeached by the assignees; and this, notwithstanding the goods bought were not such as the bankrupt usually dealt in.⁵ To hold the contrary, indeed, would (as observed by Lord Chief Justice Abbott) be productive of most serious mischief, as it would have the effect of making every person buying

¹ *Cowie v. Harris*, 1 M. & M. 141.

⁴ *Tucker v. Barrow*, 1 M. & M.

² *Ex parte Farquhar*, 1 Mont. & 140.

M. 7.

⁵ *Hill v. Farnell*, 9 B. & C. 45.

³ *Ibid.*

any article in a shop in the city of Westminster, or elsewhere not in market overt, and paying for it immediately, liable to pay a second time.¹ When, however, the goods have *not been paid for*, but purchased, for example, on a contract of sale or return²—or where a bill is even accepted for a larger sum than the price of the goods, without any express appropriation of the bill to the payment of the price;—then, notwithstanding the goods are delivered to the purchaser, the assignees may recover them in trover, when they are purchased subsequent to an act of bankruptcy.³

And in a purchase, either of real or personal property, made for a fair and valuable consideration without notice of an act of bankruptcy,—if the purchaser can defend himself at law, a court of equity will not favour assignees in their attempts to avoid the purchase, by enabling them to take advantage of the relation to the act of bankruptcy.⁴ Upon a bill for a discovery, therefore, the court of Chancery will not compel the purchaser to show *the time* of the purchase, for fear it should be overreached, and be within the time after an act of bankruptcy committed.⁵ So, also, the court has refused to compel a man to discover *what goods* he bought of a bankrupt *after the bankruptcy*, and before the commission sued out, where the party had no notice of the act of bankruptcy;⁶ though the court will compel a disclosure of the *consideration* of a purchase.⁷

And though a purchaser without notice has *not* a prior legal estate in him, but only a better title, or a better right to call for the legal estate, than the assignees, a court of equity will not in this case assist them to avoid the purchase.⁸ Where a purchaser, also, had even been guilty of misconduct in making a purchase, by giving much less than the value of the premises, for the purpose of defeating the creditors of the vendor, Lord Hardwicke permitted the

¹ *Cash v. Young*, 2 B. & C. 413. Contrà, *Saunderson v. Gregg*, 3 Star. 72. *Ward v. Clark*, Mood. & M. 497.

² *Hurst v. Gwynnap*, 2 Star. 306. The decision in this case is not very reconcileable with the facts as stated in it, as there appears to have been strong evidence of the *affirmance* of the sale by the assignees.

³ *Bishop v. Crawshaw*, 3 B. & C. 415. And this, notwithstanding at the time of the purchase the bankrupt agreed that the purchaser might

set off the price against a by-gone debt due from the bankrupt to the purchaser. *Carter v. Breton*, 6 Bing. 617; and see ante, 727.

⁴ 1 Vern. 27.

⁵ Anon. Skin. 149.

⁶ *Brown v. Williams*, 2 Ch. Ca. 135. Anon. ibid. 136. *Wagstaff v. Reed*, ibid. 156. *Fisher v. Touchett*, 1 Eden, 158. *Abery v. Williams*, 1 Vern. 27.

⁷ Skin. 149.

⁸ *Wilks v. Bodington*, 2 Vern. 599.

purchase-deed to stand as a security for the money really and *bonâ fide* advanced.¹ And an equitable purchaser is as much within the protection of the statute as a purchaser by an actual conveyance at law.²

With respect to purchasers and other parties *with notice* of an act of bankruptcy—it has lately been decided, that where a party, to whom the bankrupt had released a debt after the act of bankruptcy, knew that the bankrupt was insolvent,³ the release was invalid, although it was executed *more than two months* before the commission issued.⁴ And the assignees, in an action against such party, need not aver in pleading, that the defendant knew of the act of bankruptcy when he took the release; but it is sufficient at the trial to prove that he had such notice.⁵

But by section 86 of the new statute, it is declared that no purchase from any bankrupt *bonâ fide* and for valuable consideration, though the purchaser *had notice* at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after *such* act of bankruptcy.

Where A., in 1828, conveyed the whole of his property to trustees, in trust to sell and pay his creditors; and in 1830 the trustees sold part of the estates to B., and A. joined with the trustees in the conveyance to B.; and in 1833 B. sold the purchased premises to D., who objected to the title, on the ground that the conveyance of 1828 was an act of bankruptcy, but no commission had issued against A.; it was held that the conveyance to B. was protected by the above section.⁶

The above provision of the statute is an extension of the relief afforded by the 21 Jac. 1, c. 19, s. 14, under which no purchase could be impeached after the expiration of five years; but in the construction of which statute it was holden, nevertheless, that no purchaser whatever was protected who *had notice*.⁷

In order to impeach a purchase *with notice* of an act of

¹ *Barwell v. Ward*, 1 Atk. 260.

² *Read v. Ward*, 7 Vin. 119.

³ The knowledge would, of course, now be confined to an act of bankruptcy; for knowledge merely of insolvency, or stoppage of payment, can (under the new act)

no longer be considered as constructive notice. See post.

⁴ *Mavor v. Payne*, 3 Bing. 285.

⁵ *Ibid.*

⁶ *Earl Granville v. Danvers*,

7 Sim. 121.

⁷ *Mouniford v. Ponten*, Mont. 79.

bankruptcy, the commission must be sued out within twelve calendar months after the *act* of bankruptcy, of which the purchaser *had notice*; for the statute is express in restricting the period to twelve months after *such* act of bankruptcy. Its being sued out, therefore, within twelve months of any *other* act of bankruptcy, will not be sufficient. And, indeed, under the 21 Jac. 1, c. 19, it was determined, that if an act of bankruptcy was committed, and then a sale made by the bankrupt—and then another act of bankruptcy—and a commission was sued out within five years after the last act, but above five years after the first—the sale should not be defeated under these circumstances; for an act of bankruptcy to avoid a sale under that statute must have been committed before the sale, and also within five years before the commission.¹

A subsequent act of bankruptcy, however, has been holden not to defeat the interest which creditors have acquired in the bankrupt's estate by a prior act; therefore, where after one act of bankruptcy was committed, another was committed by an outlawry, and the king thereupon made a lease of the profits of the bankrupt's lands, and a grant of his chattels,—the lease and grant were held, under the 21 Jac. 1, not to prejudice the creditors of the bankrupt, the commission being sued out within five years after the first act of bankruptcy. But if the commission had been sued out five years after that act of bankruptcy, then the assignee of the king's lease would have been considered a purchaser within the statute,² and not to be impeached.

The relation of the act of bankruptcy, as it affects the right of a *mortgagee* to *tack* further advances made *after* an act of bankruptcy, has been already considered in a former chapter.³

SECTION III.

As to other Dispositions of the Bankrupt's Property.

The 6 Geo. 4, c. 16, s. 81, and 2 & 3 Vict. c. 29, (as we have already seen ⁴) apply to *all contracts and other dealings and transactions* made with a bankrupt.

¹ *Bradford v. Bludworth*, 1 Lev. 13. 2 Sid. 69. *Spencer v. Vanacre*, Keb. 722; and see *Jellif v. Horn*, Keb. 11.

² *Pain v. Teap*, 1 Salk. 108.

³ Chap. ix.

⁴ See ante, 725 and 735.

The assignees, being subject to the same equities as the bankrupt, are bound by the beneficial transfer of property *bona fide* made by him before the bankruptcy, although before such transfer is strictly completed at law the act of bankruptcy may intervene. Thus, where a bill of exchange was merely *delivered* by a bankrupt to the indorsee (though with the real intent of transferring the property in it to him) more than two months before the commission, but the indorsement was not, in effect, written upon it until within the two months,—Lord Ellenborough held that the writing of the indorsement had reference to the delivery of the bill, and that the indorsee was entitled to it against the assignees.¹ And in another case, where the indorsement was not made even until after the commission issued, it was equally holden to be valid.²

Upon the same principle, in the case of goods at sea, where a *bona fide* assignment is made of the property before the act of bankruptcy, and the bills of lading are not indorsed till afterwards, the indorsement of the bills of lading cannot be impeached.³ But, though the legal transfer of property, which has been equitably assigned before an act of bankruptcy, can be perfected afterwards,—yet other property cannot be then substituted for the property originally assigned. Therefore, where a trader pledged for value the bills of lading of an expected cargo, part of which his agents abroad without his knowledge had disposed of—and after having committed an act of bankruptcy, he then caused other goods to be substituted, and sent the bills of lading of these goods to the pawnees,—it was held, in this case, that the pawnees could not retain the substituted goods against the assignees.⁴

With respect to the transfer of property in *ships at sea* (in order to give effect to which certain forms are required by the registry act)⁵ it is now settled, that notwithstanding an act of bankruptcy intervenes between the execution of the bill of sale and the full compliance with all the requisites of the registry act,—yet if all those requisites are in fact finally complied with pursuant to the directions of the statute, the transfer of the property will be held good against any claim of the assignees. For the bill of sale is

¹ Anon. 1 Camp. 492.

² *Smith v. Pickering*, Peake, 50; and see *ex parte Greening*, 13 Ves. 206.

³ *Lempriere v. Pasley*, 2 T. R.

485. *Belcher v. Oldfield*, 6 Bing.

N. C. 102. *Brown v. Heathcote*, 1 Atk. 160.

⁴ *Meyer v. Sharpe*, 5 Taunt. 74.

⁵ See ante, 462.

held now to pass the *absolute* property in the ship, subject only to be divested in case the directions of the registry act are not pursued. Therefore, a power of attorney from a bankrupt to sign an indorsement on the certificate of registry of a ship when she returned home, in order to give effect to a previous bill of sale, is not revoked by a subsequent act of bankruptcy—it being only a power to do a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy.¹ Where, however, the act of bankruptcy intervenes between the bill of sale and the completion of the forms required by the registry act, and there is at the same time *gross delay* in the completion of those requisites,—then the bill of sale will become void as against the assignees.² And where certain things regarding the registry are directed to be done, without specifying any given time for their completion, they must be done within a reasonable time; which (Lord Ellenborough observed) is as capable of being ascertained by evidence, as if it had been fixed by the act of parliament.³

Where a trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader, and afterwards sold the goods and received the money,—the factor was held to be answerable to the assignees for the value of the goods, upon the ground of relation back to the act of bankruptcy.⁴ So an agreement between the bankrupt and the defendants before the bankruptcy, that the defendants should accept bills, to enable the bankrupt by his agent abroad to purchase cargoes and transmit them to the defendants, who were to pay their acceptances out of the proceeds, and to place the surplus to the account of the bankrupt,—is no defence to an action by the assignees for proceeds received by the defendants *after the bankruptcy*.⁵

The relation to the act of bankruptcy of one partner, as it affects subsequent transfers of the partnership property by the solvent partner, has been already fully considered in the preceding chapter.⁶ It is greatly to be lamented

¹ *Dixon v. Ewart*, Buck, 94.
³ Meriv. 322; and see *Palmer v. Moxon*, 2 M. & S. 43. *Mestaer v. Gillespié*, 11 Ves. 637. *Hubbard v. Johnston*, 3 Taunt. 208.

² *Moss v. Charnock*, 2 East, 399.
Per Bayley, J., 2 M. & S. 51.

³ 2 M. & S. 50.

⁴ *Copeland v. Stein*, 8 T. R. 199.

⁵ *Carter v. Barclay*, 3 Star. 43.

⁶ Ante, 676.

that so much difference of opinion prevails upon this very important branch of the bankrupt law between the courts of law and equity.

SECTION IV.

As to Executions and Attachments.

By 6 Geo. 4, c. 16, s. 81, before referred to, all executions and attachments against the lands and tenements, or goods and chattels, of a bankrupt, *bond fide* executed or levied more than two calendar months before the issuing of the commission, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the person, at whose suit such execution or attachment shall have issued, had not at the time notice of any prior act of bankruptcy.¹ And the protection (as we have seen²) is now extended by the 2 & 3 Vict. c. 29, to any time before the issuing of the fiat.

But by 6 Geo. 4, c. 16, s. 108,³ (which is not repealed by 2 & 3 Vict. c. 29,⁴) no creditor having security for his debt, or having made any attachment (in London or any other place by virtue of any custom there used) of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of his debt, except in respect of any execution or extent *served and levied by seizure* upon, or any mortgage of, or lien upon, any part of the bankrupt's property before the bankruptcy. And no creditor,⁵ though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, con-

¹ And see 21 Jac. 1, c. 19, s. 9; 49 Geo. 3, c. 121, s. 2.

² Ante, 735.

³ The first part of this section follows nearly the 21 Jac. 1, c. 19, s. 9.

⁴ *Whitmore v. Robertson*, 8 M. & W. 463.

⁵ This means a creditor who comes in under the commission, and who, having sued out execution upon a judgment so obtained, shall not retain such execution, but takes advantage of the commission in respect to any further rights. The 81st and 108th sections must be taken together; and the expression at the end of the latter section, that such creditor shall "*be paid*

rateable with the other creditors," seems to imply that he must come in under the commission, for how otherwise is he to be *paid rateably with the other creditors*? The 108th section, therefore, does not declare such judgment void, but leaves the case of a creditor, obtaining execution upon judgments against a defendant before his bankruptcy, exactly where it was before the passing of the act, unless the creditor comes in under the commission. For this reason, Sir L. Shadwell, Vice-chancellor, decided that the chancellor has no jurisdiction, under the 108th section, against a judgment-creditor, who does not prove. *Ex parte Botcherley*, 2 G. & J. 367.

fession,¹ or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be *paid rateable* with the other creditors.²

In the construction of these two sections, it has been held that the 81st applied to all executions levied more than two months before the issuing of the commission, whether founded on judgments after verdict, or on judgments by default or confession; and that the 108th section applied only to executions on judgments by default or confession, or *nil dicit*, where the seizure has taken place within the two calendar months before the issuing of the commission. Therefore, when a *fiery facias* was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards; and on the 13th of October following, about noon, a commission issued against the defendant; it was held that the seizure of the goods by the sheriff was a sufficient executing or levying within the meaning of the 81st section, and that more than two calendar months had elapsed between the execution and the issuing of the commission; and that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet that, having been executed more than two months before the issuing of the commission, it was protected by the 81st section, and not taken out of that section by the proviso in section 108.³

So, where a creditor had obtained judgment by default on a warrant of attorney, and the goods were seized by the

¹ By 1 Will. 4, c. 7, s. 7, after reciting that by means of this provision plaintiffs have been and may be deterred from accepting a *cognovit actionem*, with stay of execution, whereby the expense of further proceedings in the action may be saved or diminished; it is enacted, that no judgment signed, or execution issued, on a *cognovit* signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the above provision of the 108th section.

² The last part of the above section is adopted from the Irish statute of the 11 & 12 Geo. 3, c. 8,

s. 5; and is also an extension of the provision of the 3 Geo. 4, c. 39, ss. 2, 3, which declared all warrants of attorney and *cognovits* to be void, as against assignees, unless they were filed, or judgment was entered up, within twenty-one days after their execution. The new provision seems a very wholesome one to prevent a fraudulent preference of a favourite creditor.

The 3 Geo. 4, c. 39, is not repealed by the 6 Geo. 4, c. 16, s. 81; but there may be some doubt whether that statute extends to cases, where there has been no act of bankruptcy at the time of giving the warrant of attorney. *Wilson v. Whittaker*, 1 Mood. & M. 8, per Lord Tenterden.

³ *Godson v. Sanctuary*, 4 B. & Ad. 255.

sheriff before, but not sold until after, the act of bankruptcy, the court of King's Bench refused to compel the sheriff to pay over the proceeds of the sale to the assignees. Per Lord Tenterden: "It is impossible to say to what extent we may be called upon to exercise a summary jurisdiction, if we were to make the present rule absolute."¹

Where judgment was entered up on a warrant of attorney, before any act of bankruptcy committed by the defendant, and an execution was issued, and the goods sold under it, before such act of bankruptcy; it was held that this clause of the statute did not apply to such a case, and that the assignees were not entitled to the goods taken and sold under the execution,² for the plaintiff, after the execution was duly satisfied, could no longer be considered a creditor.

Judgment was entered up on a warrant of attorney given by two joint traders, and a *fi. fa.* issued, returnable on the 2nd of May. On the 1st of May, the sheriff's officer received from the defendants the money directed to be levied. On the 2nd of May, one of them committed an act of bankruptcy, and the other on the 5th. On the 11th, a commission of bankrupt issued; and on the 19th, the sheriff paid over the money to the execution creditor. In an action by the assignees against him, it was held that he was entitled to retain it, as he could not be considered a creditor having a security at the time of the bankruptcy.³

"After seizure and before sale, the sheriff has a special property in the goods, but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment creditor has a security for his debt. But after sale, or payment of the money, the sheriff becomes the debtor, and the original debt is extinguished."⁴

Where the sheriff sold goods under a *fi. fa.*, after the act of bankruptcy, without notice of such act of bankruptcy, and afterwards paid over the proceeds to the execution creditor upon an indemnity: held, that the assignees might sue the sheriff for money had and received, inasmuch as the indemnity was virtually notice of the act of bankruptcy.⁵ In this case, however, it is to be observed that the act of bankruptcy was committed before the issuing of the *fi. fa.*

The court of King's Bench refused to set aside an execution issued upon a judgment of *nil dicit*, under a warrant of attorney, and served and levied by seizure upon the property

¹ *Re Washbourn*, 8 B. & C. 444.

722. And see *Ramsey v. Eaton*,

² *Wymor v. Kemble*, E. T. 1827.

10 M. & W. 22.

K. B. 6 B. & C. 479.

⁴ Per Bayley, J., 8 B. & C. 726.

³ *Morland v. Pellatt*, 8 B. & C.

⁵ *Young v. Marshall*, 8 Bing. 43.

of a bankrupt before his bankruptcy, holding that the statute 6 Geo. 4, c. 16, s. 108, did not render the execution in such case void, but merely declared that the party should not avail himself of it to the prejudice of other fair creditors. And Mr. J. Holroyd said that he entertained considerable doubt whether the question upon this enactment could be determined in a court of law.¹

But in a subsequent case, where an indenture (which was in legal effect a *cognovit actionem*, within the meaning of the 3 Geo. 4, c. 39,) had *not been filed* with the proper officer within twenty-one days after the execution of it, pursuant to the requisitions of that statute, and judgment was not entered up until after the expiration of the twenty-one days, it was ordered, on an application by the assignees of the party against whom judgment had been so entered up, that an execution issued on such judgment should be withdrawn.²

It has been determined that a bill does not lie to set aside an execution obtained by *nil dicit*, but that the proper remedy is by petition.³

Where a creditor obtained judgment by *nil dicit* against a trader, and thereupon issued a *fi. fa.*, under which the sheriff seized the goods, and afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor: held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received.⁴

Quere.—Whether the sheriff was justified in selling after the act of bankruptcy?⁵

So a judgment by *nil dicit*, though obtained without collusion in an action of assumpsit, has been decided to be within the 108th section, which comprises every species of judgment, except judgment after verdict, trial by the record, and on demurrer; and this though the judgment was obtained before the act came into operation. Nor is such a judgment less a judgment by default, because a writ of inquiry is interposed between the interlocutory and the final judgment.⁶

If the goods are sold by the sheriff, the execution is valid,

¹ *Taylor v. Taylor*, 5 B. & C. 392.

² *Hurst v. Jennings*, 5 B. & C.

⁴ *Notley v. Buck*, 8 B. & C. 160.

⁵ *Ibid.*

⁶ *Cuming v. Welford*, 6 Bing. 502.

³ *Mitchell v. Knott*, 2 G. & J. 293.

although the act of bankruptcy is committed before the return of the writ.¹

Where a supplemental order, in a suit in equity against the bankrupt, directed payment of money into court, it was held, that when the money was paid in under the order, it was specifically fixed with the equities of the plaintiff, and as such was not within the operation of the 108th section.²

As an execution, in order to have any legal operation, must (under the above section) be served and levied by seizure, the writ being merely *tested* before the bankruptcy is insufficient,—or even being previously delivered to the sheriff; for such delivery is not an execution of it.³ So, an execution of the writ, by a delivery of the warrant to a shopman of the trader as a special bailiff, though there were no regular bailiffs in the county into which the writ was issued,—has been holden not to be a sufficient execution of the writ, so as to protect the property against the claims of the assignees, by reason of the reputed ownership.⁴ But where the goods are actually seized by the sheriff *bonâ fide* before the act of bankruptcy, that is sufficient to render the execution valid.⁵

When the act of bankruptcy is by *lying in prison*, and an execution is executed after the first arrest, though before the act of bankruptcy is complete by lying in prison the full time required by the statute,—it has been held that the execution is avoided, by relation to the first arrest.⁶

With respect to the validity of executions and attachments against partners, where *one* of the partners has previously committed an act of bankruptcy, the reader is referred to the preceding chapter.

If the goods be seized by the sheriff the *same day* that the party commits an act of bankruptcy, it is open to inquire which had the priority; and the validity of the execution has been held to depend upon such priority.⁷ So, where the sheriff took possession, and the same day at a later hour the bankrupt surrendered in discharge of his bail, the execution has been holden valid.⁸ But where an *extent of the Crown* issues the same day that the assignment of the

¹ *Higgins v. M'Adam*, 3 Y. & J. 1.

² *Hitchens v. Congreve*, Mont. 225.

³ *Phillips v. Thompson*, 3 Lev. 69, 191. *Bayley v. Burnings*, 1 Lev. 173. *Smallcombe v. Cross*, 1 Id. R. 251.

⁴ *Jackson v. Irvin*, 2 Camp. 48.

⁵ *Cole v. Davies*, 1 Ld. R. 724.

⁶ *Coppendale v. Bridgen*, 3 Burr. 814; but see ante, 77.

⁷ *Sadler v. Leigh*, 4 Camp. 197.

⁸ *Thomas v. Desanges*, 2 B. & A. 586.

bankrupt's effects is made to the assignees, in this case, it has been held that the Crown shall be preferred;¹—though it seems very doubtful now,—since the old maxim in law (of there being no fraction of a day) has been broken in upon by many subsequent decisions,²—whether the Crown would really be preferred, where the assignment was *bonâ fide* executed before the issuing of the extent.

An extent of the Crown binds the property of the king's debtor from the *teste* of the writ, or rather from the time of the *fiat*; for the writ, at whatever time it issues, may always be tested the same date as the *fiat*, though it cannot be tested before.³ Therefore, if it is issued at any time previous to the execution of the commissioner's assignment—(before which the property is not legally out of the bankrupt)⁴—it will be preferred to the claim of the assignees; and this preference, it seems, will prevail as well with respect to *debts* due to the bankrupt at the time of the *teste*, as with the bankrupt's *goods*;⁵ for the Crown is not affected by the operation of the assignment, in relation back to the act of bankruptcy.⁶ And where goods were seized under an extent, and the writ and inquisition returned by the sheriff, though the debtor becomes a bankrupt before the issuing of the liberate, the execution of the extent is good⁷ against the assignees.

If an extent is issued after the date of the bargain and sale of the bankrupt's lands, but before enrolment, it seems that the extent will be preferred to the bargain and sale; for it has been held, that in *bankruptcy* the enrolment does not (as in other cases) relate back to the date of the bargain and sale.⁸

For further information, as to the operation of extents, and other process, or the recovery of the king's debt, the reader is referred to a former chapter,⁹ where the effect of the assignment upon the process of the Crown has been already fully considered.

¹ *Rex v. Crumpton*, cit. 2 Ves. 295. Parker's Rep. 126.

² *Saunderson v. Gregg*, 3 Star. 72; and see ante.

³ *Rex v. Mann*, Str. 749. West on Extents, 58.

⁴ *Queen v. Arnold*, 7 Vin. Ab. 104.

⁵ *Ibid.*; and see ante, Chap. xi. Part 2, sect. 10.

⁶ *Attorney-General v. Capel*, 2 Str. 480; and see 2 Str. 982. 4 T. R. 411.

⁷ *Audley v. Halsey*, Cro. Car. 148. Jones, 203.

⁸ *Rex v. Hopper*. West on Extents, 149, et seq. Christ. 533; and see ante, 349.

⁹ Chap. xi. Part 2, sect. 10.

SECTION V.

What is Notice of an Act of Bankruptcy.

It will have been observed, in the progress of this inquiry as to the effect of the relation to the act of bankruptcy, that (with the exception of purchases made more than twelve calendar months before the commission issues, and process at the suit of the Crown,) the validity of any dealing or transaction with the bankrupt, under any of the foregoing circumstances, depends entirely upon the person so dealing with him having *no knowledge or notice* that he had committed an act of bankruptcy. A most important branch of the law of relation, therefore, remains to be considered, viz., what amounts to *notice* of a previous act of bankruptcy sufficient to avoid a payment to, or a dealing with the bankrupt—which payment or dealing would otherwise have been good.

The *notice*, which would deprive a party of the protection given him by former acts of parliament, has been defined very differently in the various statutes; some confining it to *actual knowledge*¹ of an act of bankruptcy, while others extended it to notice “of an act of bankruptcy, or *insolvency*,”² or of “bankruptcy, insolvency, or *stoppage of payment*.”³ And by Sir Samuel Romilly’s acts it was *first* declared, that the mere striking of a docket⁴—and afterwards, that the issuing of a commission only⁵—should amount to *constructive* notice of an act of bankruptcy;—this last provision being in conformity with the old rule of law, namely, that the issuing of a commission was a public act, of which all the world was bound to take notice.⁶

But by 6 Geo. 4, c. 16, s. 83, the issuing of a commission is only declared to be notice of a prior act of bankruptcy (if an act of bankruptcy has been actually committed before the issuing of the commission)—provided the adjudication

¹ 1 Jac. 1, c. 15, s. 14.

² 19 Geo. 2, c. 19, s. 14.

³ 46 Geo. 3, c. 135, s. 1.

⁴ *Ibid.* s. 3.

⁵ 49 Geo. 3, c. 121, s. 2.

⁶ *Hitchcox v. Sedgewick*, 2 Vern. 156. *Watkins v. Maund*, 3 Camp. 308; but see *Sowerby v. Brooks*, 4 B. & A. 523, in which Lord C. J. Abbott very justly observes, that the words “*understand or know*,”

in the statute 1 Jac. 1, c. 15, s. 14, (upon the construction of which that case was decided,) must be construed according to their ordinary and popular sense, viz. an *actual* understanding or knowledge, and not a knowledge to be implied by force of law (from the secret issuing of an unknown commission) against the truth of the fact.

of bankruptcy shall have been notified in the *London Gazette*, and the person to be affected by such notice may reasonably be presumed to have seen the same.

By section 85, also, if any accredited agent of any *body* corporate or public company shall have had notice of any act of bankruptcy, the corporation or company shall be thereby deemed to have had such notice.

The *notice*, as defined by the new statutes,¹ is simply "*notice of a prior act of bankruptcy*;"—and the only *constructive* notice is the *issuing of a commission*, provided a previous act of bankruptcy has been actually committed, and the adjudication has been notified in the *Gazette*, and the person to be affected by the notice may reasonably be presumed to have seen the same.

The only *actual notice*, therefore, that will now prejudice a party being confined to the *act of bankruptcy*, it becomes immaterial to consider those cases decided with reference to the former statutes, and determining what would and what would not amount to notice of insolvency,² or stoppage of payment.

But though notice of a docket being struck is no longer notice of an act of bankruptcy,³ yet when that is connected with other circumstances—such as a party refusing to pay a check in favour of a bankrupt without an indemnity—it would be strong evidence to go to a jury, that the party *had notice* of the act of bankruptcy.⁴

For where enough has been done to put a debtor on his guard, so as to give him reason to believe that his creditor is a bankrupt, this may amount to notice of an act of bankruptcy, as absolute certainty of the fact is not necessary; for notice does not mean knowledge.⁵

And where a party himself strikes a docket against a bankrupt, this is *prima facie* evidence of his having notice of an act of bankruptcy. Thus, where a creditor struck a docket against the bankrupt which he afterwards abandoned, and took an assignment from the bankrupt of all his property, in trust for himself and the other creditors; and after he had incurred some expense in the execution of the trusts, another creditor sued out a fiat against the bankrupt, under which the assignees seized the bankrupt's property in the hands of the first-named creditor; it was held that he had no lien on it, as against the assignees, the docket struck by him being

¹ See 6 Geo. 4, c. 16, ss. 81, 82, 50; and 2 & 3 Vict. cc. 11 and 29.

² Anon. 1 Camp. 492, n. *Bayly v. Schofield*, 2 M. & S. 338.

³ *Hocking v. Acraman*, 12 M. & W. 170. 1 Dowl. N. S. 434.

⁴ *Spratt v. Hobhouse*, 4 Bing. 173.

⁵ *Ibid.*

prima facie evidence of his having notice of an act of bankruptcy prior to the trust assignment, and the assignment itself amounting to an act of bankruptcy.¹

When the act of bankruptcy consists in the execution of a fraudulent deed, it has been determined that notice of the deed by a person who is *not a party* to it, is not sufficient notice of the act of bankruptcy.² And notice to a sheriff's officer in possession under a *fi. fa.* of an act of bankruptcy, committed by the defendant, is not notice within 2 & 3 Vict. c. 29.³ It seems, however, that general notice to the creditor, that the debtor has committed an act of bankruptcy, is sufficient, without stating the nature of it.⁴ But a letter from the bankrupt to the creditor, saying he had resolved not to open his bank on Monday, is no notice of an act of bankruptcy, but only notice of an intention to commit an act of bankruptcy.⁵

Buying goods of a trader to a great extent, for nearly two years, at more than 30 per cent. under prime cost, is evidence of knowledge by the purchaser of the insolvency of the seller.⁶

¹ *Ex parte Swinburne*, 3 Dea. 514.

² *Read v. Ward*, 7 Vin. 119.

³ *Ramsey v. Eaton*, 10 M. & W. 22.

⁴ *Ibid.*

⁵ *Ex parte Hallifax*, 2 M. D. & D. 544.

⁶ *Yates v. Carneco*, 3 C. & P. 100.

CHAPTER XVII.

OF SET-OFF.

- SECT. 1. *Of the Right of Set-off generally in Bankruptcy.*
2. *Construction of the Term "Mutual Credit,"
and herein of Cases of Trust and Deposit.*
3. *As to Joint and Separate Debts.*
4. *Of Set-off between particular Persons.*
5. *Of Set-off on Bills and Notes.*
6. *Of an Equitable Set-off.*
7. *Of the Mode of Balancing the Accounts.*
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SECTION I.

Of the Right of Set-off generally in Bankruptcy.

By 6 Geo. 4, c. 16, s. 50, it is provided, that where there has been *mutual credit* given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given, or the debt contracted by him; and what shall appear to be due on either side on the balance of the account shall be claimed or paid on either side respectively; and every debt or demand made proveable by the statute against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy committed by the bankrupt.

This section has consolidated the provisions of the 5 Geo. 2, c. 30, s. 28, and the 46 Geo. 3, c. 135, s. 3; but it has also made some *alterations* in the enactments of those statutes, which it may be as well, in the first place, to notice. *First*, the credit need not now be given (as by the 46 Geo. 3, c. 153,)

two months before the date of the fiat; therefore, the accounts may now be taken down to the date of the fiat.¹ *Secondly*, the notice, by which the party is to be affected, is confined simply to *notice of an act of bankruptcy*; and it is now, therefore, immaterial to inquire whether the party had notice that the bankrupt was insolvent, or had stopped payment. *Thirdly*, the statute declares that *every debt or demand which may be proved*, may also be set off against the bankrupt's estate. Consequently, all those cases² which have been decided not to be within the provision as to mutual credit, because the debt was *contingent*, would now meet with a different decision; as such debts may now be proved under 6 Geo. 4, c. 16, s. 56. But, with this exception, it does not appear that there is any provision in that statute to constitute a case of mutual credit, which was not so before.³ And as the accounts may, also, now be taken down to the date of the commission, provided the party had no notice of an act of bankruptcy when the credit was given, he will not now be deprived (as he was before the statute)⁴ of his right to retain a payment made to him by the bankrupt after an act of bankruptcy, for the purpose of taking up bills not due, but which he has made himself liable to pay when due, for the bankrupt's accommodation.

The right of set-off in bankruptcy did not, as has been frequently supposed, originate in the statute law, but was (before any interference of the legislature) adopted in practice, by the courts of law, which permitted a creditor to set off his debt against his bankrupt debtor, and to pay over or prove the balance, as the case might happen to be.⁵

And this remedy or right of set-off of the *creditor of a bankrupt*, is more comprehensive and effectual than the

¹ See *Southwood v. Taylor*, 1 B. & A. 471, as to the effect of the 46 Geo. 3.

² *Ex parte Groome*, 1 Atk. 115. *Hancock v. Entwistle*, 3 T. R. 435. *Ex parte Whittaker*, 1 Rose, 301. *Sampson v. Burton*, 2 B. & B. 89. *Dobson v. Lockhart*, 5 T. R. 133.

³ Eden, 184.

⁴ *Tamplin v. Diggins*, 2 Camp. 312. *Kinder v. Butterworth*, 6 B. & C. 42.

⁵ Anon. 1 Mod. 215. *Chapman v. Derby*, 2 Vern. 117; and see 1 Christ. B. L. 279, 499. 1 Goodinge B. L. 190. The first statute that took notice of the right was the

4 & 5 Ann. c. 17, which was continued for five years by the 7 Ann. c. 25, s. 4. This last stat. was re-enacted with some variation by the 5 Geo. 1, c. 24, which, also, was but a temporary act; and after its expiration, a similar but more effectual provision relative to mutual debts and credits was incorporated in the 5 Geo. 2, c. 30, s. 28. Next came the additional provision of the 46 Geo. 3; which last provision, together with that of the 5 Geo. 2, seem to have formed the groundwork for the enactment in the present statute.

general law of set-off under the statutes of the 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24,—in the construction of which, indeed, doubts were formerly entertained whether those statutes could be extended to assignees under a commission of bankruptcy,¹ on the ground that there was no *mutual debt* between the assignees of a bankrupt and the creditor. But, though the right of set-off in bankruptcy is perfectly distinct and independent from that given by the general statutes of set-off, yet the latter are held now to extend to actions by assignees, concurrently with the provision of the bankrupt law as to cases of mutual credit.² It is not, however, intended to discuss *every* case that has been decided under the general statutes of set-off, but only those in which any point of bankruptcy has been agitated in the course of the decision.

If a creditor consents that his debtor shall set off the debt against a debt due from the creditor to another person, it seems that the agreement, although not in writing, is valid.³

A set-off may, without pleading it, be given in evidence in an action by assignees, and it may be either as to the whole or part of the demand, with a tender for the remainder.⁴

SECTION II.

Construction of the Term "Mutual Credit," and herein of Cases of Trust and Deposit.

The above enactment, we perceive, (in accordance with that of the 5 Geo. 2, c. 30, s. 28,) relates not only to *mutual debts*, but to *mutual credits*. There are many cases, therefore, to which a set-off may be extended where an action would not lie, and where a court of equity even could not upon a bill decree an account.⁵ The statute, also, is not to be construed as confined to dealings in *trade* only, or to cases where there are mutual running accounts; for it is but natural justice and equity, that in *all* cases of *mutual credit*, only the balance shall be paid.⁶ The term "*mutual credit*" has, indeed, always received from the courts a very liberal construction, and has likewise not been confined merely to *pecuniary* demands; for, as Lord Hardwicke

¹ *Ryall v. Larkin*, 1 Wils. 155.

⁵ *Ex parte Deeze*, 1 Atk. 228.

² *Ridout v. Brough*, Cowp. 133.

French v. Fenn, C. B. L. 554. *Atkinson v. Elliott*, 7 T. R. 378.

³ *Cozen v. Chadley*, 1 C. & P. 174, 485.

⁶ *Lanesborough v. Jones*, 1 P. Wms. 325.

⁴ *Wells v. Crofts*, 4 C. & P. 333.

observed, it would be hard where a man has a debt due from the bankrupt—and has at the same time goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity—that the assignees should take them from him without satisfying his whole debt.¹ This observation, however, must be confined to a case where a party has (either by usage, custom, or contract,) a *lien* for his general balance on goods of a bankrupt deposited with him—or, where the credit given by the delivery of the property must in its nature *terminate* in a debt.² The right of *set-off* is, indeed, at *common law* always incident to the right of *lien*; but the amount of the set-off will depend upon the nature and extent of the lien. Thus a *factor*, having by law a lien for his *general balance*, will have a right to set off the *whole of his debt* due from the bankrupt; and (in his case) not only by virtue of such general lien, but also by reason that the goods delivered to him were delivered for the purpose of sale, and therefore constituted such a credit as must terminate in a debt. But a *fuller* or a *mill*, who have only a particular lien, and to whom the cloths and the corn are delivered, not for the purposes of sale, but merely to be respectively dressed and ground—a delivery, consequently, which is not such a credit as *must terminate in a debt*—have neither of them a right of set-off beyond the amount of their respective charges for their labour bestowed on the *specific goods* remaining in their possession. They have, therefore, not a right of set-off under the present, or indeed under any of the former statutes relating to bankrupts; for the term “mutual credit” cannot be extended³ to a case of this description.

The above observation, indeed, of Lord Hardwicke in *Ex parte Deeze*, has been commented upon in many decisions, as if it was applicable to every case of deposit or mutual trust, whatever may be the *object* or *purpose* of the deposit or trust. But Lord Chief Justice Gibbs has clearly shown in the above-mentioned case of *Rose v. Hart*, that though something more is meant by the term *mutual credit* than the words *mutual debt* import,—yet as the statute says that upon stating the account one *debt* may be set against another, this implies that the legislature meant *such credits* only as *must in their nature terminate in debts*. As when a debt is due from one party, and credit is given by him to the other for a sum of money payable at a future day, and which will

¹ 1 Atk. 228.

³ *Rose v. Hart*, 8 Taunt. 499.

² *Rose v. Hart*, 8 Taunt. 499.

then become a debt—or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other;—in such cases, the *credit given* by the delivery of the property *must* in its nature *terminate in a debt*; the balance will be taken on the two debts, and the words of the statute will in all respects be complied with. But where there is a *mere deposit* of property, without any authority to turn it into money, *no debt* can ever arise out of it; and, therefore, it is *not a credit* within the meaning of the statute. This principle, his lordship says, will support all the cases that have been determined on the subject; that is, all those cases in which there was no evidence of the right of a *lien* for the general balance.

The general right of *lien* depends upon totally different principles from the doctrine of *set-off in bankruptcy*—though in many of the reported cases it is not very clear whether the determination proceeded in respect of the set-off or the *lien*. Where the creditor is entitled to a *general lien*, then he may, independently of any statute as to set-off or mutual credit, retain the goods in his possession until he has been satisfied his whole debt. As where a *packer* had goods of the bankrupt's in his hands, and there was evidence of a custom that packers had a *general lien* upon all goods in their possession, it was decided that he might retain the goods for the whole of his demand.¹ But in the case of the *mill* before mentioned, who had corn and flour of the bankrupt's in his possession, and where there was no evidence of any custom in the trade entitling him to a *general lien*, he was only allowed to retain for the price of grinding the specific corn.² These cases, therefore, seem to establish the position that, unless on the ground of usage or positive agreement, a depository of goods for other purposes than that of sale has no right under the particular provision in the new statute as to *mutual credit*, to set off against the value of such goods the whole of a debt due from the bankrupt to himself.

A *trust*, however, between two parties, where the object

¹ *Ex parte Deeze*, 1 Atk. 228. This evidence of the *custom* does not appear in the report of the case itself; but the fact was so stated by Lord Hardwicke in the subsequent case of *ex parte Ockenden*, when he was pressed with his former decision in this case. And these *general observations* of his, therefore, in *ex parte Deeze*, being

unaccompanied by any statement of the real ground of his decision, have been the cause, perhaps, of their receiving in subsequent cases somewhat too great a latitude of construction. See an able analysis of all the cases on this subject in Eden's B. L. 179, et seq.

² *Ex parte Ockenden*, 1 Atk. 234.

of the trust was the *sale of goods*, and one party was indebted to the other on another account, has been decided to be a mutual credit within the former statutes. Thus, where three persons joined in an adventure to buy and sell pearls, one of whom was to advance the money and to sell the pearls, but the profit and loss was to be divided between the three;—one of the parties becoming bankrupt, the party (who was to sell the pearls) was allowed to set off a debt due to him from the bankrupt, in an action commenced against him by the assignees, against a third share of the pearls belonging to the bankrupt,—although the pearls were not sold, nor the produce received, until after the bankruptcy.¹

So where A. purchased of B. a parcel of goods, and afterwards a second parcel, both at six months' credit, and when the first sum became due, lodged in the hands of B. a bill of exchange for a larger amount than the value of the goods, in order to pay what then remained due in respect of the *first parcel*, B. engaging to return the overplus when the bill should be paid—it being understood that this deposit was not a general deposit to answer both demands, but for the specific purpose of securing only the remainder of the value of the *first parcel*—B. received the amount of the bill, and then A. became bankrupt, not having paid for the *second parcel*:—upon an action brought by A.'s assignees for the surplus of the bill, it was held that B. might retain it, to satisfy his demands on A. for the *second parcel*,—Lord Kenyon observing that he agreed with the doctrine, that where there is a *trust* between both parties, there is a *mutual credit*; and that justice required that the whole account on both sides should be stated, and that the balance should be the only thing to constitute the debt.²

So, also, where a principal *entrusted* his broker with a policy of insurance to receive an average loss under it, and then became a bankrupt—and the broker afterwards received the average loss,—he was allowed to set off several sums of money due to him from the bankrupt for premiums, &c. against the amount he received upon the policy after the bankruptcy; for the average loss was held to be a debt due before the bankruptcy, though not ascertained till afterwards.³

In another case, A. (a merchant) employed B. (a broker)

¹ *French v. Fenn*, C. B. L. 536.

² *Whitehead v. Vaughan*, C. B.

³ *Atkinson v. Elliott*, 7 T. R. L. 566. *Parker v. Carter*, *ibid.* 378; but see *Key v. Flint*, 1 Swanst. 567.
30, and post, 759.

to effect policies and sell goods, and *trusted* him with the possession of the policies and the goods; A. being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods to the exclusion of A.'s general credit, became bankrupt: afterwards a loss happened on one of the policies, and B. received it from the underwriters;—this was decided to be a case of mutual credit, and that B. might retain the sum received for the loss, not only in liquidation of the balance due for the premiums, but also of his advances—Lord Chief Justice Gibbs (who tried the case) deciding it on the ground that the bankrupts had *trusted* the defendants with the possession of goods and of policies of insurance, and that the defendants had *trusted* the bankrupts with the money advanced, and the premiums paid for them on the policies; and that the general principle was, that wherever each party has *trusted* the other with the possession of value, the assignees of either party (in case of his bankruptcy) can only withdraw that value from the other, on the terms of paying what is due between them.¹

A sum of money, also, payable after the bankruptcy at a future day, though not in strictness a mutual debt, is held to be within the meaning of the term "*mutual credit*."² Thus, where A. lent his acceptance to the bankrupts, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons—and A. paid the amount after the commission issued, and before an action was brought against him by the assignees for a debt owing by him to the bankrupt;—it was holden, that he was entitled to set off the amount of such payment under the words "*mutual credit*."³ So, where certain bankers had discounted bills of exchange for the bankrupt, giving him credit for their value in his account—and while they were still running, struck a balance, by which they admitted themselves indebted to the bankrupt—and after his bankruptcy the bills were dishonoured;—it was held, that in an action by the assignees for the balance admitted to be due before the bankruptcy, the bankers had a right to set off the amount of the dishonoured bills.⁴

In all these cases it will be observed, that what was allowed as a *mutual credit* was of such a nature as must terminate

¹ *Olive v. Smith*, 5 Taunt. 56.

² *Ex parte Prescott*, 1 Atk. 230.

³ *Smith v. Hodson*, 4 T. R. 211.

Ex parte Boyle, C. B. L. 542. *Ex parte Wagstaff*, 13 Ves. 65.

⁴ *Arbousin v. Tritton*, - Holt, N. P. C. 408.

in a *cross debt*. Thus in *French v. Fenn*, there was a debt due from one party to the other, and one party was entrusted by the other with his share in the pearls for sale, which (when sold) would of course constitute a *cross debt* in respect of the proceeds. So in *Whitehead v. Vaughan*, and *Olive v. Smith*, the bankrupts were indebted to the defendants, and delivered policies of insurance to them to collect losses, which (when collected) would make the defendants their *debtors* for the amount. And in *Smith v. Hodson*, the defendant had entrusted the bankrupt with his acceptance, which he was liable to pay, and which (when paid) would create a *debt* from the bankrupt to him for the amount.

But a contract to indorse a bill of exchange is not a case of mutual credit within the 6 Geo. 4, c. 16, s. 50, but merely a case where a cause of action arises for the non-performance of a contract.¹

And where there is an express contract establishing a lien on a chattel for payment of a particular debt, then this is not subject to be defeated by any right of set-off under the statute; as where a tradesman undertook to repair a carriage for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money, and he afterwards became bankrupt; it was held that the 6 Geo. 4, c. 16, s. 50, did not, in this case, render the assignees liable in trover for refusing to deliver the carriage to the creditors, on his offering to set off the price of the work against his own demand.²

There is another case under this head which seems to have gone further than any of the preceding, inasmuch as the delivery of the goods to constitute the debt was only a *constructive* delivery to the party dealing with the bankrupt, while in all the other cases, the property had been either actually delivered, or was already in the possession of the party. J. S. being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants (through whom the shipment was to be made) that the goods were the property of A., and shipped on his account,—and A. accordingly (by the desire of J. S.) wrote to the merchants, stating the fact to be so, and directing them to insure, and advance money to J. S. on the goods, which was done:—J. S. at this time was largely indebted to A., and afterwards became bankrupt;—under these circumstances, it was held that this was a credit given to A. by J. S. by the delivery of goods in its

¹ *Rose v. Sims*, 1 B. & Adol. 521.

² *Clarke v. Fell*, 4 B. & Ad. 404.

nature likely to terminate in a debt; and that A. was not only entitled to recover the proceeds of the shipment from the merchants, but to set off against those proceeds the amount of the debt due to him from the bankrupt.¹

But where a bailee is entrusted with property of a bankrupt for a *special and limited purpose*, then (like the case of the miller and the fuller, who have no general lien) such a transaction does not form a case of *mutual credit* within the meaning of the statute. As where the bankrupts deposited a bill of exchange with a creditor, for the specific purpose of raising money on it, and not as a satisfaction of his debt;—it was held that the creditor (having only advanced part of the amount) could not, in an action of trover by the assignees, retain the bill for his general balance previously due to him from the bankrupts, but only for the money actually advanced by him on the bill.² And Lord Eldon, when the same case came afterwards before him on petition, said that it was contrary to natural equity that a creditor who had made advances on the security of a bill of exchange deposited with him for a special purpose, and who had undertaken to receive the amount when due, and return the surplus, should set off advances *prior to the transaction* against a demand by the assignees for the bill.³

So, where the bankrupts had remitted a bill to the defendants, for the express purpose of getting it discounted, and applying the proceeds in a particular way; but, instead of doing this, the defendants retained the bill, and received the money when due, which was after the bankruptcy; it was held that the assignees might sue the defendants for money had and received, and that the latter could not set off a debt due from the bankrupts.⁴

It is not necessary in order to constitute a case of mutual credit within the meaning of the statute, that the parties *intended to trust* each other in the transaction; for if a bill of exchange, which is accepted by the bankrupt, be sent out into the world, credit is then given to the acceptor by every person who takes the bill.⁵ Thus, where a bill accepted by A. got into the hands of B., and B. bought

¹ *Easum v. Cato*, 5 B. & A. 861.

² *Key v. Flint*, 8 Taunt. 21.

³ *Moore*, 451.

⁴ *Ex parte Flint*, 1 Swanst. 30.

This decision certainly appears somewhat at variance with that of *Atkinson v. Elliott*, ante, 756, though Lord C. J. Dallas thought

there was a distinction between the two cases, inasmuch as the form of action in that case was *assumpsit*, and in this *trover*.

⁵ *Buchanan v. Findley*, 9 B. & C. 788.

⁶ Per Buller, J., 3 T. R. 508 (note).

goods of A.,—it was holden that there was a *mutual credit* between A. and B., although A. did not know that the bill was in B.'s hands.¹

SECTION III.

As to Joint and Separate Debts.

(And see post, Section VI.)

In order to establish a clear right of set-off, it is essential that the debt claimed to be due to either party, or the credit given, should be due to or given by him *in his own right*, and not in the right of another person; for, though the statute is intended to give a certain extension to the right of set-off at law, yet it does not take away the necessity of what was before required in these cases, viz., a *strict mutuality*. Therefore, there can be no set-off between *joint and separate* debts. This principle, indeed, has always prevailed at law; and though in bankruptcy such a set-off has been in some cases formerly permitted,² yet it seems to be now established, that (unless there is a special agreement between the parties to the contrary) the same rule in this respect ought to govern set-off in bankruptcy, as well as set-off at law.³ Thus, where A. had a joint demand against B. and C., who were also joint creditors of A.,—and B. and C. having dissolved their partnership, B. (by a letter addressed to A.) made himself *separately* liable to A., on account of the joint demand of A. against himself and C.;—Lord Eldon held that B. was, under these circumstances, not entitled to set off against A.'s demand (though originally joint) the joint debt due from A. to B. and C.; for that, when B. made himself *separately* liable to A., his doing so did not make the joint debt, due from A. to B. and C., a *separate* debt to B.⁴ And the same rule, that a joint debt cannot be set off against a separate demand, prevails also in equity, as well as in bankruptcy and at law.⁵

But where a *joint* debt has—by the death of all the persons but one to whom it was jointly due,—become a debt

¹ *Hankey v. Smith*, *ibid.*; and see *Shekton v. Rothschild*, 8 Taunt. 156.

² *Ex parte Edwards*, 1 Atk. 100. *Ex parte Quinten*, 3 Ves. 248.

³ *Ex parte Christie*, 10 Ves. 105. *Ex parte Twogood*, 11 Ves. 517; and see *Doe v. Darnton*, 3 East, 149.

⁴ *Ex parte Ross*, Buck, 125.

⁵ *Addis v. Knight*, 2 Meriv. 117.

to the survivor, it has been held, under the statutes of set-off at law, that such a debt may then be considered as a *separate* debt, and may be set off against a debt due from such survivor in his own right.¹ And, in like manner, a defendant may set off a debt due to him *from* the plaintiff as *surviving partner*, against a debt due from himself to the plaintiff in his own right.² So, a joint and several bond may be set off against only one of the obligors who executed it; for the bond, being *joint and several*, became the separate debt of both.³ So, in an action by several partners, where the name of *one only appeared* in the business, the defendant was allowed to set off a debt due to him from that one partner—the other partners having (as Lord Kenyon expressed it) held out false colours to the world, by permitting that one partner to appear as the sole owner.⁴ So also, where the defendants gave their bankers a note on account of a demand which the bankers made on them, but which afterwards proved to be much less than the sum for which the note was given,—and the bankers indorsed the note to another firm, which was formed of *some of the partners of the banking-house*,—and the holders brought an action against the defendants;—the defendants were held entitled to set off a debt due to them from the bankers; for the parties who brought the action (being partners in the banking-house) could not, *as between themselves*, divert the note to *another* purpose, and leave the whole of the defendant's debt outstanding.⁵

As the statute also only relates to mutual credits between *bankrupts* and other persons, it will not apply to a case where only *some* partners of a firm are bankrupts. Consequently, though an action be brought by the assignees of the bankrupt partners together with the solvent partner against a defendant, on account of a partnership debt, the defendant, if he is not entitled to a set-off at law, is not entitled under the foregoing enactment as to mutual credit; for in such a case, if *any* credit existed, it was between the *bankrupts* together with a *solvent person* on the one side, and the defendant on the other. Therefore, where three partners, A., B., and C., delivered bills to D. for a special purpose, and A. and B. became bankrupts,—it was held, that in an action brought by their assignees (together with the solvent partner C.) against D., for the proceeds of the

¹ *Slipper v. Slidstone*, 5 T. R. 493.

² *French v. Andrade*, 6 T. R. 582.

³ *Fletcher v. Dyche*, 2 T. R. 32.

⁴ *Stacey v. Ross*, 2 Esp. 269.

⁵ *Puller v. Roe, Peake*, 197; and

see post, as to Equitable Set-off.

bills, the defendant could not set off against such claim a debt due to him from A., B., and C.¹

SECTION IV.

Of Set-off between particular Persons.

A debt due to an *executor* in his *representative* character, cannot be set off against a debt due from him on his *private* account.² And though the executor also happen to be residuary legatee, such a set-off will not be allowed; for these are debts in different rights, and there is no mutual credit.³ But where an executor had furnished money and goods to a legatee, who became bankrupt—upon which the executor filed a bill against the assignees for an allowance to be made to him out of the legacy, on account of the money which the bankrupt owed him,—the court decided that a legacy due from an executor (who admits assets) is in equity a debt due from the executor, and in this case allowed the set-off.⁴ So, an executor may set off a debt due to the testator against a legacy bequeathed to the bankrupt; for when the assignees bring their bill against the executor, they can only stand in the place of the legatee, and can have no better right than what the legatee himself possessed.⁵

A debt due from the bankrupt to a *trustee*, on account of his *trust*, cannot be set off by the trustee against a debt due from him in his *own right*. Therefore, where third persons holding the acceptance of a trader (who was known to be then in bad circumstances), agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due)—but without communicating to the trader that they were the holders of his acceptance—and the goods were purchased by the defendants according to the mode agreed upon;—it was held,

¹ *Staniforth v. Fellowes*, 1 Marsh. 184; and see *Thomason v. Frere*, 10 East, 418.

² *Bishop v. Church*, 3 Atk. 691; and see Willes, 103, for cases which determine that a debt, accruing to a party in the lifetime of the testator, cannot be set off by him

against a debt accruing to the executor. See also *Shipman v. Thomas*, 1 Esp. 240. Bull, N. P. 180.

³ *Ibid.*

⁴ *Jeffs v. Wood*, 2 P. Wms. 128.

⁵ *Ibid.*; and see *Burridge v. Row*, 1 Y. & C., C. C. 190. And *ex parte Makins*, 2 M. D. & D. 509.

that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, as they did not hold it in their *own right*, but in effect as trustees for the persons who had indorsed it to them for the above-mentioned purpose.¹ This case was decided on the ground of fraud,—and that the defendants were not the *bonâ fide* holders of the bill, but had lent themselves improperly to the real owners, to obtain for the latter a right of set-off. Where, however, a creditor buys goods of his debtor in the ordinary mode of business, though the contract be to pay for the goods in ready money, the creditor will then not be prevented from setting off his debt against the price of the goods.² If an action be commenced by a trustee in right of his trust, the defendant may set off a debt due to him from the *cestui que trust*.³

The directors, or trustees, of a *public company* incorporated by act of parliament, cannot set off a debt due to them from the bankrupt for a loan of money before his bankruptcy, against a demand made upon them by the assignees for the amount of the stock held by the bankrupt, the loan not being made on the credit of the stock; for it was considered that the bankrupt was indebted to them upon the loan as *private* persons, and that the stock was due to him from the company in their *corporate* capacity: it was considered also, that the company could have no lien upon the stock, having no such special property in it as could give them a lien; for they were vested with the stock in their *corporate* capacity only, and for the particular purposes directed by the act; but the specific stock of each proprietor was vested in himself alone.⁴ But where there was an express bye-law subjecting the stock of each member of a company to be distrained for such debts as he should owe them, and the bankrupt was indebted to them for a balance in his hands as their banker, or cashier,—the company was allowed in this case to set off the debt against the stock and dividends belonging⁵ to the bankrupt. So also, where a director of a public company assigned his salary and share to the company, in order to secure a debt due from him to them on his private account, and empowered the company to

¹ *Fair v. M'Iver*, 16 East, 130; see also *Forster v. Wilson*, 12 M. & W. 191.

² *Eland v. Karr*, 1 East, 375.

³ *Bottomley v. Brook*, Whitm. B. L. 204. *Rudge v. Birch*, *ibid.* *Webster v. Scales*, *ibid.*

⁴ *Meghioruchi v. Royal Exchange Assurance Company*, 1 Eq. Ca. Ab. 9.

⁵ *Gibson v. Hudson's Bay Company*, 1 Str. 645.

direct the treasurer to retain his salary and dividends, and sell his shares for the payment of the debt,—but the power given to the company had not been exercised, and the shares still remained in the director's name,—it was held, that though the shares on his bankruptcy passed to his assignees, as being in his order and disposition, yet that the company had a right of set-off for the dividends and salary due to him at his bankruptcy.¹

A debt owing by the bankrupt to the wife, *dum sola*, cannot be set off against a debt due from the husband.² And it has been decided also upon the general statute of set-off, that a debt due from the wife, *dum sola*, cannot be set off in an action brought by the husband alone—unless, indeed, he has promised to pay the debt after marriage, and thereby made it his own.³ But where a legacy was given to the wife of a bankrupt, and she died without asserting any claim to it,—the court held, that as at law a legacy to the wife is a legacy to the husband (though subject in equity to her right to a provision)—this legacy, being discharged of that equity in consequence of her death, would have become the absolute property of the husband if there had been no bankruptcy; that, as against the husband, the executor would have had a right to satisfy the legacy, by writing off so much of the debts due from the husband; and that he must have the same right against the assignees.⁴ And in a subsequent case of this description, the executors were allowed to set off a debt due from the bankrupt to the testator, against a moiety of a legacy given to the wife—the other moiety being ordered to be settled on the wife for life, with remainder to the issue of the marriage.⁵

The right of a *broker*, who effects a policy of insurance, to set off the money due for losses or returns of premium against the claim of the assignees of the underwriter, depends in a great measure upon the fact, whether or not the broker receives a *del credere* commission—and whether he effects the policy in his *own name*, or in that of his principal. If a broker acting under a *del credere* commission effects the policy in his *own name*, the right of set-off is allowed; for a commission *del credere* being an absolute engagement to the principal from the broker, and rendering him liable at all events, places the broker himself in the nature of a principal as to

¹ *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

² *Ex parte Blagden*, 2 Rose, 249.
19 Ves. 465. *Paynton v. Walker*,
B. N. P. 179.

³ *Wood v. Ahers*, 2 Esp. 594.

⁴ *Ranking v. Barnard*, 5 Mad. 32.

⁵ *Ex parte O'Farrall*, 1 G. & J.
34; but see *Carr v. Taylor*, 10 Ves.
578.

the underwriter, and clothes him with all the rights of the principal, unless the latter steps in between him and the underwriter.¹ And the same is also held under the general statutes of set-off.² But where the broker does *not* act under a *del credere* commission, he is then not entitled to such right of set-off; for, in this case, the losses or the returns of premium are a debt properly due to the assured; and the broker, even with respect to the underwriter, can only be considered as an agent, whose authority (by the bankruptcy of the underwriter) is virtually countermanded and extinct. Therefore, where a broker (without such a commission) was indebted to an underwriter for premiums due upon policies subscribed by him before his bankruptcy, he was held to be not entitled to set off against the assignees of the underwriter returns of premium due upon the arrival of ships, whether the ships arrived before,³ or subsequent to the bankruptcy.⁴ The court of Common Pleas in these two cases (contrary to the opinion of the court of King's Bench,⁵ which considered the broker, as to a return of premium, a sort of stakeholder between the underwriter and the assured,) treated the return of premium as a contingent debt, due from the underwriter to the assured—and the broker as merely the agent of the underwriter, to receive the premium for him, and for nothing else—holding, therefore, that the broker could not, after the underwriter's bankruptcy, make himself the agent of the assignees, for the purpose of detaining money to be paid by the underwriter to the assured.⁶ And even where the broker acts under a *del credere* commission, yet if he discloses the name of his principal to the underwriter, he will not then be entitled to this right of set-off.⁷

A broker, however, may have the same right of set-off by virtue of a *lien*,⁸ as that which he possesses by virtue of a commission *del credere*—as where, for instance, he acquires an interest by making advances to his principal on the credit of a particular consignment of goods. Therefore, where brokers (not acting under a commission *del credere*) effected policies on account of their principal, but in their own names, and accepted bills drawn on them on account of goods con-

¹ *Grove v. Dubois*, 1 T. R. 112.
² *Bize v. Dickason*, *ibid.* 287.

³ *Weinholt v. Roberts*, 2 Camp. 586.

⁴ *Minett v. Forrester*, 4 Taunt. 541.

⁵ *Goldschmidt v. Lyon*, 4 Taunt. 534.

⁶ *Shee v. Clarkson*, 12 East, 507.

⁷ *Per Mansfield, C. J.*, 4 Taunt.

544.

⁸ *Koster v. Eason*, 2 M. & S. 112.

Morris v. Cleasby, 1 M. & S. 576.

4 M. & S. 560. *Peel v. Northcote*,

7 Taunt. 478.

⁸ And see *ante*, 751, 756.

signed to them, which were lost before their arrival,—it was held, that the brokers might set off the amount of such loss against the claim of the assignees of the underwriter for the premiums due, in respect of his subscription to the policies of insurance on the goods.¹ So, as we have already seen,² a broker *entrusted* by his principal with a policy to receive an average loss under it, though he receive it after the bankruptcy of his principal, has a right, by reason of his *lien* on the policy, to set off money due to him from the bankrupt for premiums, against the money he received from the underwriters;³ and that the receipt of the average loss *after* the bankruptcy was no objection to his right of set-off; as the debt was *due* to the bankrupt *before* the bankruptcy, though not ascertained till afterwards. And, indeed, in all cases of *mutual trust and credit* (as has been before observed)—where the trust or credit *must terminate in a debt*—any other person, as well as a broker, has a right of set-off under the statute, in respect of a balance due to him from the bankrupt.⁴

With respect to the right of set-off by an *underwriter* against the assured—it is now settled by the unanimous decision of the twelve judges (though the point was shortly before decided differently in the Common Pleas)⁵—that an *underwriter* may set-off, against the assignees of the assured, the amount of premiums due to him *before* the bankruptcy, against a loss accruing *after* the bankruptcy. The case was argued as one of mutual credit under the 5 Geo. 2, c. 30, s. 28; but the decision of the judges proceeded on the equitable construction of the 19 Geo. 2, c. 32, s. 2, (which is now incorporated in the 53rd section of the new act,) enabling the assured, under a commission of bankrupt against an underwriter, to *claim before* the happening of a loss, and *after* a loss to *prove* and receive a dividend. And the judges were of opinion—that, as under this statute the set-off was to be allowed to the *assured*, in the case of a bankrupt underwriter—so, by parity of reasoning, there ought to be the same allowance to the underwriter, in the case of a bankrupt *assured*. But an underwriter cannot set-off a general balance due to himself from the broker, at the time of the adjustment of a loss, against the claim of the assured. Therefore, where a

¹ *Parker v. Beasley*, 2 M. & S. 423. *S. P. Davies v. Wilkinson*, 4 Bing. 578.

² *Ante*, 756.

³ *Whitehead v. Vaughan*, *ante*, 705.

⁴ See *ante*, 756.

⁵ *Glennie v. Edmunds*, 4 Taunt. 775.

⁶ *Graham v. Russell*, 2 Marsh. 561. 5 M. & S. 499.

broker became bankrupt after the adjustment of a loss with the underwriter, though he had upon that occasion struck the underwriter's name out of the policy and the adjustment, in consideration of the balance which he himself owed the underwriter,—yet the latter was held to have no right of set-off in an action brought against him by the assured, beyond that which was due to him for premiums on the particular policy.¹

A factor can of course, like other persons (under the 50th section of the 6 Geo. 4), set off payments made by him, up to the date of the commission issued against his principal, if he had no notice of the act of bankruptcy. But this was not the case before the new statute.²

For the same reason as applies to the case of a broker³—so, where a *factor* acts under a *del credere* commission, and sells goods in his *own name*, concealing the name of his principal, the person dealing with him has a right to consider him to all intents and purposes as the principal; and though the real principal may afterwards appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal;⁴ and may also plead these facts specially, in support of his right of set-off against the demand of the principal.⁵ By the recent statute of the 6 Geo. 4, c. 94, which enables a factor to *pledge* goods deposited with him by his principal, the person (with whom any goods shall have been so pledged) has a right of set-off against the owner, to the amount of the money advanced upon the goods; and the real owner redeeming the goods is entitled, in case of the bankruptcy of the factor, to set off⁶ the amount paid by him for their redemption, against any debt due from him to the factor.

If a *banker* receives and pays money on account of a bankrupt *after notice* of his bankruptcy, he cannot set off the payments against the receipts, in an action by the assignees.⁷

¹ *Todd v. Reed*, 3 Star. 16.

² See *Kinder v. Butterworth*, 6 B. & C. 42.

³ *Ante*, 764.

⁴ *Rabone v. Williams*, 7 T. R. 360, in note. *George v. Clagett*, 7 T. R. 359. *Escot v. Milward*, *ibid.* C. B. L. 378.

⁵ *Carr v. Hinchliff*, 4 B. & C. 547.

⁶ Section 6; and see *ante*, 477, 524.

⁷ *Vernon v. Hankey*, 2 T. R. 113. 3 Bro. 313.

SECTION V.

Of Set-off on Bills and Notes.

With respect to the right of an indorsee to set off a bill of exchange, or promissory note, against the debt owing by him to the bankrupt, a distinction is taken between a bill indorsed *before*, and one indorsed *after*, the bankruptcy. A bill indorsed *before* the bankruptcy, we have seen,¹ can be set off against a debt accruing from the indorsee to the bankrupt after the indorsement; for, though the bankrupt might not know when the bill was indorsed to, or came to the possession of the party, yet the bankrupt, by sending a bill into the world with his name upon it, gains a credit from every person who takes it afterwards. But a bill indorsed *after* the bankruptcy cannot be set off; for, notwithstanding the debt (as against the bankrupt) may have existed before the bankruptcy,² it is not a debt due from him to the same party as at the time of the bankruptcy; and though it is allowed to be proved, yet the right of proof is very different from the right of set-off. By the former no *new* charge is brought upon the estate; but that is not the case in the latter instance; and a creditor, it has been said, has no right thus to vary the relation in which he stood to the bankrupt's estate at the time of the bankruptcy, by a transaction *ex post facto* with a third party, and thereby put himself in a better situation than the rest of the bankrupt's creditors.³ And even where a party, who had indorsed the bill *before* the bankruptcy of the acceptor, was obliged to take it up *afterwards*, in consequence of the acceptor's bankruptcy, Lord Loughborough held that he could not *set off* the bill against a debt due to the bankrupt's estate, though he might *prove* the amount under the commission.⁴ It is incumbent, also, on the indorsee to show that the indorsement was made *before* the bankruptcy; for a case of set-off is in the nature of a cross action, in which the party would be obliged to prove everything necessary to substantiate his demand; and the time when the bill was indorsed would be a material fact in support of his case.⁵ Thus, in an action brought by the assignees of a country banker, the defendant cannot set off cash notes payable to

¹ Ante, 758.⁴ Ex parte Hale, 3 Ves. 304.² Marsh v. Chambers, 2 Str. 1234.⁵ Lucas v. March, Barnes, 453. Dickson v. Evans, 6 T. R. 57.³ Cullen's B. L. 205; and see Evans v. Prosser, 3 T. R. 186.

bearer, and issued by the bankrupt *before* his bankruptcy, unless the defendant shows that such notes also came to his hands *before* the bankruptcy.¹ But if the notes are taken *before* the holder has notice that the bankers committed an *act of bankruptcy*, he has now, under the 6 Geo. 4, c. 16, s. 50, a right to set them off against the assignees, notwithstanding he took them after he knew that the bankers had stopped payment.²

So, a bill returned to a debtor after the bankruptcy of the creditor, may be set-off against the assignees.³ But proof, that notes to the *amount* of the set-off claimed came into the defendant's hands three or four weeks *before* the bankruptcy, is sufficient evidence for the jury to presume possession of them, without actually identifying them at the time of the bankruptcy.⁴

As a creditor cannot vary the relation in which he stands to the bankrupt's estate at the time of the bankruptcy, so neither can the bankrupt himself, or his assignees, after there has once been a mutual credit constituted between the creditor and the bankrupt before the bankruptcy, by any act of their own put an end to that mutual credit, so as to deprive the creditor of his right to set off any debt due from the bankrupt to him against the sum claimed from the creditor as acceptor of a bill. Thus, where A. accepted a bill drawn by the bankrupts (with whom he kept cash as bankers), who indorsed it to S., and afterwards became bankrupt, having money in their hands belonging to A.; and S., upon A.'s refusal to pay the bill, paid himself the amount out of funds of the bankrupts in his hands, and delivered the bill to their assignees;—it was held, that in an action by the assignees against A. as acceptor of the bill, he had a right to set off the debt due to him from the bankrupts at the time of their bankruptcy.⁵

In a case of cross-acceptances,—in order to enable the holder of the bankrupt's acceptances to avail himself of them (in an action by the assignees against himself on his own acceptances), by way either of set-off or mutual credit,—he must most distinctly prove, either that the obligation on himself to pay the bills so sought to be set off subsisted *before* the bankruptcy, or that there was a *mutual credit* created in the *origin* of the bills.⁶ An acceptance, though

¹ *Lucas v. March*, Barnes, 453.
² *Dickson v. Evans*, 6 T. R. 57.

³ *Haakins v. Whitten*, 10 B. & C.
 217. *Dixon v. Cass*, 1 B. & Ad.
 343.

⁴ *Collins v. Jones*, 10 B. & C. 784.

⁵ *Moore v. Wright*, 2 Marsh. 209.

⁶ *Bolland v. Nash*, 8 B. & C. 105.

⁷ *Ouchterlony v. Easterby*, 4
 Taunt. 888.

not due until after the bankruptcy of the drawer, it has been already observed,¹ may be set off against a debt due from the acceptor to the drawer.²

Where an agent of the bankrupt (being provided with funds for that purpose) accepted bills drawn by the bankrupt, who paid them away to his creditors—and the holders of the bills, after they became due and before the act of bankruptcy, in order to relieve the acceptor from his responsibility to them, took from him a composition of 10s. in the pound, and delivered up the bills to the acceptor;—it was held, that as the bankrupt's estate was discharged against any claim of the bill-holders by such composition, the acceptor had a right to set off the *full amount* of the bills against any claim of the assignees—the transaction being considered, in law, a payment of the whole amount of the bills by the acceptor, and a gift by the holders to the acceptor of the difference between what was actually paid, and the amount of the bills.³

SECTION VI.

Of an Equitable Set-off.

As the lord chancellor in bankruptcy exercises an *equitable*, as well as a *legal* jurisdiction, he will extend that jurisdiction to cases of set-off that are not within the immediate operation of the statute, upon the same principle as where there are mutual demands between parties, which cannot be made the subject of set-off at law, a court of equity will frequently interpose between the parties upon equitable principles, and determine what is justly due from one party to the other.⁴ As where a contract was entered into, upon which one of the parties had taken usurious interest,—though a party to such a contract could not have enforced it, or set off the sum due upon it *at law*, Lord Hardwicke permitted the sum really advanced upon it to be set off in account in a suit of equity.⁵

So where a lady directed her bankers to sell certain exchequer annuities, and to invest the produce in navy annuities, and the bankers informed her that they had followed her directions, and an entry was made in her banking-book, in which credit was given to her regularly for the dividends:—several years afterwards her brother, having a separate

¹ Ante, 757.

² Ex parte *Wagstaff*, 13 Ves. 65.

³ *Stonehouse v. Read*, 3 B. & C. 669.

⁴ *Dinwiddie v. Bailey*, 6 Ves. 136.

Townrow v. Benson, 3 Mad. 203.

James v. Kynner, 5 Ves. 108.

⁵ *Ryall v. Rowles*, 1 Ves. 375.

account with the bankers, proposed to borrow of them 1000*l.*, upon the security of the joint and several note of himself and his sister, which was agreed to, and the note given accordingly:—the bankers became bankrupt; and it then appeared that they had not purchased the navy annuities, and that the documents which they had exhibited to the petitioner were false:—the assignees of the bankers brought an action against the brother *alone* upon the note, upon which the brother and sister petitioned to be at liberty to set off the debt due from the bankers to the sister against what was due to them upon the note;—and Lord Eldon, upon the ground of the *fraud* practised upon the sister, restrained the assignees from proceeding at law, and ordered the set-off as prayed for.¹ When this case, however, was subsequently cited as an authority, Lord Eldon observed, that there were certain difficulties in the decision of it; and that but for the fraud, he should have doubted much whether his decision was right.²

But although there can in general be no set-off (as we have already seen³) between joint and separate debts, yet upon equitable principles, and independently of any case of fraud, such a set-off, in order to prevent circuity, will be occasionally allowed. Thus where A. (upon entering into partnership with B.) applied to his bankers for a loan to constitute his capital, to which they consented, upon condition that B. should join in a security for the repayment of the loan—and A. and B. accordingly gave the bankers their joint and several bond:—the partnership opened a joint account with the bankers, who also continued the private bankers of A.:—the bankers became bankrupt, when the balance on the *joint* account, arising from this loan, was *against* A. and B., but A's *private* account was in *his* *favour*;—under these circumstances, A. and B. were allowed to set off this private balance due to A., against the joint debt due from them both to the bankers; for though A. could not at law have pleaded a set-off of this private balance due to him alone, in an action brought against him and B. jointly on the bond, yet the moment the bankers obtained judgment, A. could have then brought his action against them for his separate debt; and if B., the surety, had paid the joint debt, A. would, of course, have then repaid him by the money recovered in that action; consequently, the joint debt due from A. and B. on the bond was nothing more, as Lord Eldon observed, than a

¹ Ex parte *Stephens*, 11 Ves. 24.

² Ex parte *Blagden*, 2 Rose, 251. 19 Ves. 467.

³ See ante, Section 3.

security for the separate debt of A.; and upon equitable consideration, a creditor, who has a joint security for a separate debt, cannot resort to that security, without allowing what he has received on the separate account, in respect of which the joint security was given.¹

Upon the same principle, where two partners gave a joint and several bond to a creditor, who afterwards became indebted to A. (one of the partners), and B., the other partner, becoming bankrupt, the creditor proved the bond under B.'s commission, and then brought a joint action against A. and B., to which B. pleaded his certificate,—an injunction was granted to restrain the creditor from proceeding in the action, which being a joint one, A. would have been precluded at law from setting off the separate debt due to himself.²

Where it was agreed between A. resident in London, and B. who resided in the West Indies, that A. should accept bills drawn upon him by B. to a specific amount, upon A.'s having bills of lading filled up to his order for colonial produce—and that after deducting A.'s advances, &c., the balance was to be paid to C., for whom B. acted as agent in the West Indies:—B. accordingly shipped goods with a bill of lading filled up to B.'s order, previous to the arrival of which C. became a bankrupt:—the captain refusing to deliver the goods to A., the latter was obliged to sue him in trover, and the cause was referred to arbitration:—in an action by the assignees of C. against A. for the balance of the proceeds of the goods, it was held that A. was entitled to set off against such balance the costs of the reference, as well as the costs of the cause; for that being authorized by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods, there was nothing to show that a reference was an improper step to effect that object.³

Costs in equity, which before the new act could not be proved under a commission against a party, unless they were taxed⁴ before the bankruptcy, could still less be the subject of set-off.⁵ But as the 58th section now enables a party, who has in any suit at law or *in equity*, or in any proceeding in bankruptcy or lunacy, obtained a judgment, decree, or order, for any debt or demand proveable under the commission, to *prove* also for the costs, although *not taxed*

¹ *Ex parte Hanson*, 12 Ves. 346. 18 Ves. 232. 1 Rose, 156; and see *Fulham v. Noble*, 3 Meriv. 618.

² *Bradley v. Millar*, 1 Rose, 278.

³ *Curtis v. Barclay*, 5 B. & C. 141.

⁴ *Ex parte Smeape*, C. B. L. 192. *Rex v. Davis*, 9 East, 320.

⁵ *Ex parte Thomas*, 15 Ves. 539.

at the time of the bankruptcy;—so, it is apprehended, he will now be permitted to set off such costs against any demand of the assignees.¹ But the costs of a judgment, as in case of a nonsuit, entered up against the bankrupt after his bankruptcy, cannot be set off against the costs of an action by the assignees against the same defendant.²

SECTION VII.

Of the Mode of Balancing the Accounts.

In cases of mutual credit between the bankrupt and persons who have dealt with him before his bankruptcy, there are two modes by which the accounts may be balanced, viz. either by the³ commissioners, as directed by the statute, or upon the trial of an action at law. When a debt has once been liquidated before the commissioners, Lord Mansfield held, that it could only afterwards be litigated by an application to the great seal—the only way to question the proof of a debt being by petition to the lord chancellor.⁴ But where assignees brought an action against a defendant, who pleaded a set-off that covered the whole demand claimed by the assignees, and tendered the proof of a debt before the commissioners, as evidence of the subject-matter of the set-off,—Lord Ellenborough refused to receive it, saying that the commissioners could neither be considered as having done a binding judicial act, nor as having represented the assignees, and thus assented to the defendant's demand; and that it would only be sufficient evidence against the assignees, if it could be shown that *they acknowledged* that the proof was just.⁵ In such a case, however, the lord chancellor, if he thinks the set-off ought to be allowed, will (as he did in this) upon petition grant an injunction to restrain the assignees from further proceedings at law.⁶

On striking the balance of accounts with anyone indebted to the bankrupt, the assignees are bound by former accounts, and by the admissions contained in them, as rendered by the bankrupt. Therefore, where a bankrupt was agent for

¹ And see post.

² *West v. Pryce*, 2 Bing. 455.

³ The 4 & 5 Ann. c. 17, enabled the assignees as well as the commissioners to balance the accounts. The 5 Geo. 1, c. 11, omitted the assignees; the 5 Geo. 2, c. 30, in-

cluded them again; but the new statute once more confines the power to the commissioners.

⁴ *Brown v. Bullen*, Doug. 407.

⁵ *Pirie v. Meniett*, 3 Camp. 279.

⁶ *Ex parte Meniett*, 1 Rose, 395.

the grantor and the grantee of an annuity, and had delivered an account to the grantee, by which it appeared that the bankrupt had received certain payments on account of the annuity, but which payments had, in fact, never been received,—it was held that the assignees were bound by the account which the bankrupt had delivered, unless they could show that the bankrupt had given credit for those payments by mistake.¹ But where the bankrupt had delivered to the grantee an account, giving him credit for half a year's annuity, but describing it as "money not yet received," and debiting him with commission upon the same,—and the fact was, that the payment had not been received by the bankrupt;—in this case, it was held that his assignees were entitled to be allowed that sum in account by the grantee.² And so, where in one account credit was given to the grantee for certain sums as money actually received by the bankrupt, and they had never been received,—and in another account, subsequently delivered, the same sums were placed to the debit of the grantee *with his assent*,—it was held that the assignees were entitled to be allowed those sums in account.³

In balancing the accounts, Lord Hardwicke held, that where debts carried interest, the commissioners ought to stop interest on both sides of the account at the time of the bankruptcy; or to compute it on both sides till the final settling of the account.⁴ This rule has been objected to by a learned writer⁵ on bankruptcy; but it does not appear, by any subsequent decision, to have been departed from.

¹ *Shaw v. Picton*, 4 B. & C. 715.

² *Shaw v. Dartnall*, 6 B. & C. 56.

³ *Ibid.*

⁴ 1 Atk. 80.

⁵ See Christian's B. L. i. 524,

where it is contended, that Lord Hardwicke's rule ought only to be adopted when the balance is in favour of the bankrupt's estate, and not where it is the other way.

CHAPTER XVIII.

OF SUITS AT LAW AND IN EQUITY BY AND AGAINST THE ASSIGNEES.

SECT. 1. *Of Suits in Equity.*

2. *Of Actions at Law; and herein of Proceedings against the Sheriff.*
3. *Effect of the Bankruptcy upon Suits previously commenced by or against the Bankrupt.*

SECTION I.

Of Suits in Equity.

It is not the purpose of this chapter to consider every case, in which the assignees may have a *right* of action, or suit, against persons in possession of the bankrupt's property; that inquiry, as it is conceived, more properly appertaining to the division of a former chapter,¹ in which all the various species of property passing to the assignees by virtue of the assignment, and the different circumstances under which they can claim it, have been already fully considered. The object we have now in view is, therefore, to treat more particularly of the *forms and proceedings* which the assignees must adopt in the exercise of their right, in order to recover the different kinds of property which the bankrupt was previously entitled to;—or which he would have been entitled to, if he had not become bankrupt.

The whole of the bankrupt's estate being vested in the assignees by the assignment as fully as it was in the bankrupt himself, they have the same remedies to recover it either by suit or action²—with this exception, however, that they are by the 6 Geo. 4, c. 16, s. 88, restrained from commencing *suits in equity* without the consent of the major part in value of the creditors (who have proved under the commission) present at

¹ Chapter xi.

² Bl. Com. 485. *Hussey v. Fiddall*, 12 Mod. 324.
3 Salk. 59.

some meeting, of the purport whereof twenty-one days' notice shall have been given in the *London Gazette*; or if one-third in value of such creditors shall not attend at such meeting, then the assignees must procure the consent in writing of the commissioners. And the same previous consent, we have before seen,¹ is necessary to enable them to compound any debt, or to submit any dispute to arbitration.

Creditors cannot give the assignees a *general* power to prosecute suits, or submit matters to arbitration at their own discretion; but there must be a *meeting* of creditors as directed by the statute, to consider of *each particular suit*, or case for arbitration.² But when the meeting is properly advertised, the majority in value of the creditors present have a right to bind those who are absent.³

Where the assignees, without the consent of the creditors regularly obtained in the manner before-mentioned, take upon themselves to file a bill against any person, it has been held that the defendant may plead that the suit was not instituted with the consent of the creditors at a meeting pursuant to the requisitions of the statute.⁴ But the contrary has been since decided.⁵ And where a bill had been filed by the bankrupt before his bankruptcy, and a *supplemental* bill was filed by the assignees with the consent of the creditors, and this objection was not raised by the answer, but only taken on the hearing; Sir A. Hart, V. C., overruled it.⁶ And a *demurrer* does not lie to a bill by assignees, on the ground that it does not state the suit to be instituted with the consent of the creditors.⁷ But it has been held in a suit by an assignee against a removed assignee for an account, that a *plea* to that effect is good.⁸

Where the majority in value of the creditors refuse to permit the assignees to institute a suit in equity, it has been held, that any creditor may in that case bring one, but at the peril of costs.⁹ Thus, where the majority of creditors had dissented from bringing a suit to redeem a lease, and the other creditors filed a bill against the mortgagee and the assignees for that purpose,—redemption was accordingly decreed;¹⁰ and it was said, that this was like the case of an

¹ Ante, 343.

² Ex parte *Whitchurch*, 1 Atk. 91.

³ *Cooper v. Pepys*, 1 Atk. 106.

⁴ *Ockleston v. Benson*, 2 Sim.

& S. 265. *Smith v. Biggs*, 5 Sim. 391.

⁵ *Piercy v. Roberts*, 1 Myl. & K.

4. *Casborne v. Barsham*, 6 Sim. 317.

⁶ *Bevan v. Lewis*, 2 G. & J. 245.

⁷ *Jones v. Yates*, 3 Y. & J. 373.

⁸ *Stokes v. Doss*, 1 Beatty, 152.

⁹ *Franklyn v. Penn*, Barnard Rep. 30.

¹⁰ Ibid.

executor, who being the proper party to get in the estate, the court will not in general suffer the creditors of the testator to file a bill in equity to get it in; but that if collusion is charged, it is otherwise.¹

If the interests, however, of the creditors are not affected—as if the object of the suit by the assignees is to enforce a mere *personal claim* of indemnity—then the consent of the creditors will not be necessary to the institution of the suit. And there may be a distinction as to the necessity for the consent of creditors between an assignee commencing an original suit, and continuing a suit commenced by the bankrupt.² Nor need *all* the assignees be plaintiffs; for if any refuse to join in the suit, they may be made defendants;³ and the others would not be prevented from asserting their rights.

It is not now necessary that a bankrupt should be made a party to a bill against his assignees,⁴ though the contrary was formerly held.⁵ But though it is not necessary that the bankrupt should be joined in the suit, it is not a ground of demurrer if he is made a party to it, when he is charged as a confederate in a fraud. As where a bill was filed against a bankrupt and his assignees, stating a fraudulent bankruptcy concerted to defeat the plaintiff's execution, and praying a discovery and an injunction against an action threatened by the assignees—and the bankrupt demurred, alleging that he was not concerned in the suit, and that the discovery was matter of evidence between the plaintiff and the other defendants, to which he might be examined as a witness;—Lord Loughborough said there was no pretence for the demurrer, which was accordingly overruled.⁶ And it seems to be generally understood, that if any *discovery* is sought of the bankrupt's conduct *before* he became bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof; though his answer cannot be read against his assignees.⁷

Where a mortgagor becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the court will

¹ See the cases on this subject collected in the notes to the case of *Elmes v. M'Aulay*, 3 Bro. C. C. 624, Eden's edition.

² *Stokes v. Deay*, 1 Beatty, 152.

³ *Wilkins v. Fry*, 1 Meriv. 1.
² Rose, 27 l.

⁴ *Degolls v. Ward*, 3 F. Wms. 311, note. *Collet v. Wollaston*,

3 Bro. 228. *Gright v. Archer*, cit.

2 Ves. jun. 643. 2 Annot. 478.

Whitworth v. Davis, 1 Ves. & B.

546. *Lloyd v. Lander*, 5 Mad.

282.

⁵ *Sharp v. Gamen*, 2 Vern. 32.

⁶ *King v. Martin*, 2 Ves. jun.

641.

⁷ Mitford on Pleading, 142.

not, on the application of the *assignees alone*, make an immediate decree under the 7 Geo. 2, c. 20.¹

Where a bill was filed by a creditor (upon a debt accruing *after* the bankruptcy) against the assignees, as well as the executor of the bankrupt, for an account (on the ground of there being a surplus,) and to restrain the assignees from paying the surplus to the executor, and the assignees demurred to the bill;—the demurrer in this case was allowed, as the executor only was liable to the creditor, and the assignees to the executor.²

Upon a bill filed by the assignees for the discovery of a bankrupt's effects, the defendants will not be permitted to look into their depositions taken before the commissioners, to assist them in putting in their answer.³

In case of the death or removal of the assignees, the new assignees were obliged, before the recent statute, to file a supplemental bill to entitle them to the benefit of the proceedings in a suit begun by the former assignees; for in a case of this kind, where other assignees were by order of court put into the room of those who were dead or discharged, it was held that there was no privity between the bankrupt and the new assignees; or, at least, but an artificial one, and therefore that they could file no bill of revivor.⁴ But now by the 67th section of the 6 Geo. 4, c. 16, whenever an assignee dies, or a new assignee is chosen in the manner specified in the act, no action at law or suit in equity shall be thereby abated; but the court may, upon the suggestion of such death, or removal, and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same.

If a bill in equity by assignees be dismissed with costs, they must apply to the commissioner, in the first instance, to allow them out of the estate.⁵

An official assignee may file a bill against the personal representatives of a deceased assignee for an account of unclaimed dividends possessed by the deceased assignee; and the non-claiming creditors need not be parties to the suit.⁶

¹ *Garth v. Thomas*, 2 Sim. & St. 188.

⁴ *Anon.* 1 Atk. 88.

⁵ *Ex parte Gibson*, 1 M. & A.

² *Utterson v. Mair*, 4 Bro. 270. 479.

² *Ves. jun.* 95.

⁶ *Green v. Weston*, 3 M. & A.

³ *Boden v. Dellow*, 1 Atk. 289. 414.

(As to suits by assignees of one bankrupt partner, see 5 & 6 Vict. c. 122, s. 31, *post.*)

SECTION II.

Of Actions at Law, and herein of Proceedings against the Sheriff.

The 63rd section of the 6 Geo. 4, c. 16, as we have already seen,¹ has given the commissioners power to assign (among the bankrupt's other property) all *debts* due to him, which are declared to vest in the assignees as fully as if the assurance whereby they may be secured had been made to the assignees themselves; and it has also given them the like remedy to recover the debts in *their own names*, as the bankrupt himself might have had. This is a peculiar privilege possessed by the *assignees of a bankrupt*; for every other assignee of a debt is obliged at law to sue for the recovery of it in the name of the assignor.² An injunction, however, will be granted by the court of review to restrain the assignees from proceeding in an action when there is a good legal defence to the actions,³ or where they have not an equitable, as well as legal, right.⁴

By 5 & 6 Vict. c. 122, s. 82, all sums of money forfeited under that act, or by virtue of any conviction for perjury committed in any oath thereby directed, may be sued for by the assignees in any of the superior courts, and the money so recovered is to be divided among the creditors.

By the 31st section of the same statute, where one member of a firm becomes bankrupt, the court acting in the prosecution of the fiat, may authorize the assignee, upon his application, to prosecute any action or suit in the name of such assignee, and of the remaining partner; but such partner must have notice of the application, and may show cause against it, and if he claims no benefit from the proceedings, is entitled to an indemnity; if, however, he claims any benefit, the court may then order him to receive his

¹ Ante, 421.

² In like manner a trustee under the Scotch bankrupt act (the 54 Geo. 3, c. 137,) cannot in an English court of law sue in his own name for a *chose in action*, that statute conveying only a right of

property to the trustee, and not a right of suit. *Jeffery v. M'Taggart*, 6 M. & S. 126.

³ *Ex parte Pearce*, 2 M. D. & D. 142.

⁴ *Ex parte Booth*, 4 D. & C. 211.

portion of the proceeds of such action or suit.¹ The order may be a general order applicable to all actions and suits, and not a special order for each action or suit.²

Where assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to the bankrupt, the court of review will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity.³

If, however, a bond is made to a *trustee* in trust for the bankrupt, the assignees cannot then bring the action in their own names, but must, in such a case, sue in the name of the trustee.⁴

In actions at law by the assignees, whenever the contract is made by the bankrupt *before* his bankruptcy, they *must* state themselves in the declaration to be *assignees*; but if the contract is made by the bankrupt *after* the commission, they *need not* then name themselves assignees in the declaration;⁵ for when the bankrupt sells or makes any contract respecting property *after* the commission, the assignees may in that case treat him as their agent,—being, in this respect, in the situation of executors, who sell goods after the death of their testator. And the same in an action of trespass, where the trespass is committed *after the assignment*.⁶ And in one case, where an action was brought by assignees to recover back money paid by the bankrupt *before the commission* was opened, but *after the act of bankruptcy*, Baron Wood thought that it was *not necessary* for them to declare as *assignees*, though he acknowledged that to be the usual way.⁷ And it need not in any case be expressly stated in the

¹ This is a new power given to the commissioner. The lord chancellor only was empowered by the 6 Geo. 4, c. 16, s. 89, to authorize the assignee to prosecute such actions.

² Ex parte *Wilson*, 2 Dea. 387.

³ Ex parte *Ryland*, 2 D. & C. 392.

⁴ Ex parte *Coysegame*, 1 Atk. 193. —Before the act for abolition of arrest for debt on mesne process, it was held that one of several assignees might hold the defendant to bail on an affidavit of the debt, stating it to be due from the defendant, “as appears by the bank-

rupt's books, and as the deponent believes.” (*Swayne v. Crammond*, 4 T. R. 176. *Cresswell v. Lovell*, 8 T. R. 418.) But in every such affidavit a tender in bank notes was required to be negatived by the assignee, as in ordinary cases; (*Smith v. Barclay*, 3 Bos. & P. 219;) an affidavit by the bankrupt only as to this fact being held insufficient. (*Ibid.*; *Tucker v. Francis*, 4 Bing. 142.)

⁵ *Evans v. Mann*, Cowp. 569.

⁶ *Bernasconi v. Fairbrother*, 7 B. & C. 379.

⁷ *Thomas v. Riding*, Wightw. Rep. 65. 1 Rose, 121.

declaration that "the plaintiffs sue as assignees;" it is enough, if it sufficiently appears that they are assignees.¹

Assignees under a *joint commission* against A. and B., in suing on a *separate contract* entered into with A., may describe themselves generally as the *assignees of A.*, without noticing the name of B.²

But assignees under *three separate commissions*, that is, A. and B. being assignees under one commission, and C. assignee under two other commissions, cannot properly sue as *joint assignees*, but must state their respective interests in the declaration, for they have, in this case, not a joint and common title;³ though this would be good after verdict, if there was nothing to show by the record, that they did not claim under a joint commission.⁴ Where in an action by plaintiffs, as the assignees of C., they were described in a notice to produce a document as assignees of C. and D., this was held to be bad, although the plaintiffs were in fact the assignees of C. and D.⁵ The non-joinder of a joint assignee is a ground of nonsuit upon the trial, under a plea of the general issue, and need not be pleaded.⁶

But where assignees are removed by order of the lord chancellor, the new assignee may sue in his own name, without stating the fact of their removal, or his own appointment in the declaration, notwithstanding the cause of action accrued in the time of the former assignees.⁷

The assignees need not set forth in the declaration the commission and proceedings at large, or how the party became a bankrupt, but may declare shortly.⁸ And they may sue both in the *debet and detinet*,⁹ as the whole property of the bankrupt is vested in them by law; and a proceeding by a *scire facias* is the same in this respect as if they proceeded in a common form of action.¹⁰

Under the 6 Geo. 4, c. 16, ss. 12 and 63, assignees may maintain an action for unliquidated damages which accrued before the bankruptcy by the non-performance of a contract.¹¹

¹ *Ferguson v. Mitchell*, 2 Cr. M. & R. 687.

² *Stonehouse v. De Silva*, 3 Camp. 399. *Harvey v. Morgan*, 2 Star. 17.

³ *Roy v. Davis*, 2 Moore, 3. 8 Tunt. 134; and see post.

⁴ *Streetfield v. Halliday*, 3 T. R. 779.

⁵ *Harvey v. Morgan*, 2 Star. 17.

⁶ *Snelgrove v. Hunt*, 2 Star. 424.

⁷ *Aldrich v. Kittridge*, 8 Moore, 372. 1 Bing. 355.

⁸ *Laws v. Lamb*, Latw. 274. *Tully v. Sparkes*, Ld. R. 1546.

⁹ *Winter v. Kretschman*, 2 T. R. 45.

¹⁰ *Ferguson v. Mitchell*, 2 Cr. M. & R. 687.

¹¹ *Tully v. Sparkes*, Ld. R. 1546.

Winter v. Kretschman, 2 T. R. 45.

¹² *Bright v. Fairfield*, 2 B. & Ad. 727.

It seems to have been formerly held, that if *after an act of bankruptcy* the bankrupt paid money, or delivered goods, to any person, the assignees could not declare in *assumpsit*, but were obliged to proceed in *trespass* or *trover* for the tort.¹ But it was afterwards finally settled, that whoever takes the bankrupt's goods and converts them into money, is supposed, in justice, to receive the money for the use of the assignees (in whom the property of the goods by law is vested)—and to promise to pay it to their use; and that the law in this instance implies a privity of contract between the persons whose money it lawfully is, and the person who actually received it.² The assignees may, therefore, in such a case, either affirm the contract and bring *indebitatus assumpsit* for the money,—or disaffirm it, and bring *trover* for the goods.³ Thus, if a trader become bankrupt by lying in prison after an arrest, and a broker (having notice that a commission would be issued against him) sell the bankrupt's goods, and pay him the produce before the period of imprisonment is completed to constitute the act of bankruptcy,—the assignees may, in this case, maintain either *trover* or *assumpsit* against the broker.⁴ So, where a defendant took the goods of the bankrupt in execution after an act of bankruptcy, and then got possession of them under a bill of sale from the sheriff, Lord Ellenborough held that the assignees were entitled to recover against the defendant in an action for *money had and received*, though no money was actually paid to him, and though *trover* would have been the preferable remedy.⁵

And where a party, after notice of an act of bankruptcy, claimed a lien upon certain deeds of the bankrupt, who, in order to get possession of the deeds, paid the sum demanded, and it appeared there was no just claim for the lien; it was held that the assignees might recover back the money in an action for money had and received to the use of the bankrupt.⁶

When the assignees seek to recover goods in *disaffirmance* of the bankrupt's acts, they must show not only that the property in the goods *once vested* in the bankrupt, but must also give evidence to *avoid* the acts of the bankrupt,

¹ Per Lord Hardwicke, *Billon v. Hyde*, 1 Ves. 329.

² *Kitchen v. Campbell*, 3 Wils. 308. 2 Bl. 827.

³ *Hussey v. Fiddall*, 12 Mod. 324.

⁴ Salk. 59. *Reed v. Vaughan*, 7 Mod. 461. *Kitchen v. Campbell*, supra. *Reed v. James*, 1 Star. 134.

⁵ *King v. Leith*, 2 T. R. 141.

⁶ *Reed v. James*, 1 Star. Rep. 134; but see *Walter v. Drakeford*, ibid. 482, and *Nightingal v. Devisme*, 5 Burr. 2589.

⁷ *Noble v. Kersey*, 4 C. & P. 114.

as to the disposal of the goods. If they bring *trover*, they may recover the full value of the goods; but if they bring *assumpsit*, they can then only recover what the goods actually sold for, or what the party actually received; and in the latter form of action also, which operates as an affirmance of the contract by the assignee, the defendant will have the right of setting off any debt due to him from the bankrupt.¹

After the assignees, however, have once elected to bring either *trover* or *assumpsit*, if they proceed to judgment in the action so brought, they cannot afterwards adopt the other form of action; for a judgment in *trover* may be pleaded in bar to an action of *assumpsit* for the same goods;² since, though the actions are grounded on different writs, the cause of action is the same in each. A judgment of *nonsuit*, however, in one action would not preclude them from bringing the other.³ But they cannot affirm the same transaction in one part as a *contract*, and disaffirm it in another as a *tort*. Therefore, where a person after the bankruptcy received from the bankrupt's wife money of the bankrupt's, with which he bought South Sea bonds and delivered them to her, and the assignees seized some of the bonds as part of the bankrupt's estate; it was held that they could not maintain *trover* against such person for the money with which he purchased the remainder of the bonds, as the seizing of part of the bonds was an affirmance of the defendant's act in laying out the money.⁴ So where a creditor, after the act of bankruptcy, seized the bankrupt's goods, and sold great part of his stock-in-trade for the benefit of the creditors, and paid over to the assignees a balance due to them, after rendering a fair account of all the sales effected by him; it was held that the assignees, by accepting and retaining the balance of the account without objection, after receiving a copy of the account, either treated him as their agent, or received the balance in satisfaction for the wrongful act committed by him, and in either case could not maintain *trover*.⁵ So, where assignees recovered money from a banker paid by him upon the bankrupt's drafts after notice of the bankruptcy, they could not also maintain an action against the creditor, to whom the money was paid by the banker, though the banker had no other way of recovering

¹ *King v. Leith*, 2 T. R. 141. 2589. *Walker v. Laing*, 1 Moore, 286, note.

² *Kitchen v. Campbell*, *supra*.

⁴ *Wilson v. Poulter*, 2 Str. 859.

Hussey v. Fiddall, *supra*.

⁵ *Brewer v. Sparrow*, 7 B. & C.

³ *Nightingal v. Devisme*, 5 Burr. 310.

the money back,¹ than procuring the assignees to sue the creditor.

But although trover is in general, for the reasons above stated, the proper form of action when there is any fraud in the transaction which the assignees seek to impeach, yet there are many cases in which trover will not lie, and where the only remedy is an action of *assumpsit*. Thus, where a bankrupt *after* his bankruptcy gave a creditor a check upon his bankers, who paid the amount of it to the creditor,—it was held that the assignees could not recover the money by an action of trover against the creditor for the check, as the action proceeded on the ground that the check was worth nothing,—and assignees cannot sue for a void authority given by the bankrupt.² So, where a creditor (with the knowledge of the bankrupt's insolvency) prevailed on the bankrupt to sign bills drawn upon the bankrupt's debtors, on stamp paper produced by the creditor,—and then induced the drawees (who were not aware of his circumstances) to accept them,—it was held that trover would not lie by the assignees for the bills, there being no colour to say that either the bankrupt *before* his bankruptcy, or the assignees *after* the bankruptcy, had any property in them; but that their remedy was an action for money had and received against the defendant, when the bills were paid.³

T. R. having taken shares in a mining concern, it became necessary, in order to complete his title, that he should sign a deed of association in London by a certain day. Finding this inconvenient, he desired his son to sign in his stead, and to let the shares stand in his (the son's) name. The son executed the deed, and received a voucher, certifying him to be proprietor of seventy shares, not transferable without consent of the directors. The son afterwards sold the shares, and paid the proceeds to T. R., who had become bankrupt. The assignees of T. R. having brought trover against T. R. and his son, for the voucher and shares; held, that there was no legal title on which assignees could maintain an action.⁴

So the assignees cannot maintain trover against a vendor for goods contracted to be bought of him by the bankrupt, unless the bankrupt had the right of *possession*, as well as a right of *property* in the goods; and a vendee does not acquire a right of possession to goods bought—which are not

¹ *Vernon v. Hanson*, 2 T. R. 287.

² *Mathew v. Sherwell*, 2 Taunt. 439.

³ *Walker v. Leing*, 7 Taunt. 568.

⁴ *Moore*, 287.

⁴ *Dawson v. Bishworth*, 1 R. & Adol. 574.

delivered, and where nothing is said about any credit or time of payment—until he pays or tenders the price of the goods to the vendor.¹ And even where goods have been bought by the bankrupt at certain credit, and *part* of the price has been paid for them, but no notice was given to the persons (in whose warehouses they were deposited) to transfer them into the name of the bankrupt,—it was held that the assignees could not maintain trover against the vendor for the goods, without tendering the remainder of the price—whatever right of action they might have had against the vendor for not returning the money, which had been paid in part of the price—or for selling the goods to other persons, when according to contract he might have no right to sell.²

Where a fiat issued against a bankrupt, who had not paid 15s. in the pound under a second commission, and the assignees under the second commission brought an action of trover against the official assignee under the fiat, it was held a valid defence to the action, that the goods were in the possession of the bankrupt as reputed owner, whereupon the defendant, as such official assignee, took and converted the same for the benefit of the creditors under the fiat.³

Where, however, the bankrupt had advanced money on bills, and after an act of bankruptcy he sent the bills to the defendants, it was held that trover in this case would lie by the assignees to recover the bills from the defendants.⁴ And where, also, a bankrupt had assigned a policy of assurance to the defendant, which was afterwards discovered to be invalid, and the insurance company paid to the defendant half the sum insured as a gratuity on his giving up the policy, it was decided that trover would lie, though the value of the parchment only, and not the sum gratuitously paid, was recoverable.⁵ An action, indeed, for money had and received could not have been brought in this case; for no action will lie to recover from another what is paid to him as a gratuity.⁶

Where the defendant by indenture demised to E. and W. a fulling mill for fourteen years, and the lease, after reciting that the machinery had been valued at a certain sum, contained covenants that at the end or other sooner determina-

¹ *Bloxham v. Sanders*, 4 B. & C. 941.

² *Bloxham v. Morley*, *Id.* 951. See *Winks v. Hassall*, 9 B. & C. 372.

³ *Benjamin v. Belcher*, 11 Ad. & E. 250.

⁴ *Hall v. Barnard*, 1 Carring. N. P. 382. And see *Carruthers v. Payne*, 5 Bng. 270.

⁵ *Wills v. Wells*, 8 Tuart. 264. 2 Moore, 247.

⁶ *Boyer v. Dodsworth*, 6 T. R. 681.

tion of the term, the machinery should be again valued by two indifferent persons, chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor, but if it should be greater, the surplus should be paid by the lessor to the lessees; and during the existence of the lease the lessees became bankrupt, and their assignees declined to take the lease; but they required the defendant to appoint a person to value the machinery, and, on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation: the assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay;—under these circumstances, it was held that the assignees having demanded the machinery, were entitled to recover it in trover, and that their remedy was not by an action on the covenants, which had been in fact determined by the bankruptcy, and by their refusal to take to the lease.¹

Where assignees bring trover for goods collusively sold by the bankrupt on the eve of bankruptcy, they must prove a demand and refusal in order to maintain the action;² for the *selling* was not in itself unlawful, though the transaction might be liable to be impeached by the assignees. And the like in trover for bills of exchange delivered in contemplation of bankruptcy, though the money was received by the defendant when the bills became due; for this was not a conversion, as it was his duty to receive the money, when due, to whomsoever it might belong.³ But where they bring trover for goods in the order and disposition of the bankrupt at the time of the bankruptcy, then no demand and refusal is necessary to support the action.⁴ In trover also against a sheriff, or the party suing out the execution, *after* an act of bankruptcy,⁵ the assignees need not in this case prove an actual demand; because, the property being vested in them from the time of the bankruptcy, the execution is consequently tortious, and is in itself evidence of a conversion.⁶ And although goods are purchased in the usual course of trade of a bankrupt *after* a secret act of bankruptcy, Lord Ellenborough held, that the very act of taking the goods from

¹ *Fairburn v. Eastwood*, 6 Mees. & W. 846.

² *Nixon v. Jenkins*, 2 H. B. 135.

³ *Jones v. Fort*, 9 B. & C. 764.

⁴ *Soame v. Watts*, 1 Carr. N. P. Rep. 400.

⁵ But see 6 Geo. 4, c. 16, s. 81; and 2 & 3 Vict. c. 29.

⁶ Bull. N. P. 41.

one who had no right to dispose of them, was in itself a conversion.¹

In an action of trover by the assignees, proof of an *account stated* between the bankrupt and the defendant—from which it appears that certain proceeds constituting part of the account had come into the hands of the defendant subsequently to the bankruptcy—is sufficient to throw upon the defendant the onus of proving his right to retain such proceeds, although a large debt upon the balance may be due to the defendant.²

Where the messenger showed his warrant to a person in possession of some bacon, alleged to be the property of the bankrupt, who, upon demand made, answered, "I have it not; I have some that came from a shop in Exeter," (which was that of the son and daughter of the bankrupt,) and the messenger desired him to take care of it, and not to part with it, as more would be heard about it, and he afterwards suffered it to be removed; this was held to be a conversion.³

And where a demand is made by assignees of a chattel, to which something is affixed that belongs to the party on whom the demand is made, and he gives an unqualified refusal to deliver it up, without limiting such refusal to the article affixed to the chattel, the demand and refusal are sufficient evidence of a conversion.⁴

Trover will lie against the assignees for seizing goods by a party who is only entitled to the possession of them under a general bailment. Thus where the owner of furniture let it to the plaintiff, who placed it in a house occupied by the bankrupt's wife, it was held that the plaintiff might recover without producing the agreement with the owner of the furniture, which gave him but a mere qualified interest in it.⁵

Where the assignees were sued with the bankrupts in trover for goods, and the plaintiff proved that the bankrupts *before* their bankruptcy received, and afterwards disposed of the goods by way of pledge, having no authority so to do—and that the assignees *after* the bankruptcy took possession of the goods, and refused to deliver them to the plaintiff on demand,—it was held that this evidence did not amount to a *joint* act of conversion against *all* the defendants—the acts of the bankrupts and those of the assignees being not connected together, but wholly distinct; and that as there was only

¹ *Hurst v. Gwennap*, 2 Star. Rep. 307.

² *Carter v. Barclay*, 3 Star. Rep. 43.

³ *Hanches v. Dunn*, 1 Tyrr. 413.

⁴ *Tripp v. Armitage*, 4 Mees. & W. 687.

⁵ *Burton v. Hughes*, 9 Moore, 334.

one count in the declaration, the evidence did not, therefore, warrant a general verdict of guilty against all the defendants.¹

If a bankrupt shortly before his bankruptcy purchase goods on credit, and fraudulently resell them for ready money considerably under their invoice price,—in this case, neither an action for goods sold and delivered,² nor for money had and received,³ can be maintained by the assignees against the purchaser, to recover the difference between the sums paid to the bankrupt and the value of the goods; for, by bringing an action for goods sold and delivered, the assignees would affirm the contract; and a party selling goods at a price below their value, cannot recover the difference in an action for money had and received. The assignees might, perhaps, on account of the gross fraud practised in such a case, treat the supposed sale of the goods to the defendant as a nullity, and then trover would be the proper remedy.⁴

But assignees, in suing a defendant on a contract of sale, are not to be taken absolutely to affirm that the transaction is *fair throughout*—but merely that nothing *on the part of the bankrupt* was fraudulent; they do not therefore admit that there was no fraud in the parties against whom they are undertaking to enforce it. Thus, where third persons holding the acceptance of a bankrupt, who was known then to be in bad circumstances, agreed with the defendants, in order to get value for this bill, (which had been before refused to be taken by the bankrupt in payment for goods from such third persons,) that it should be indorsed to defendants, who should buy goods of the bankrupt in *their own names*, but for the account of such third persons, and then set off the bill in payment for the goods,—it was held, that though this was a fraudulent contrivance between the defendants and the original holders of the bill to get payment of the whole debt of the latter out of an insolvent estate, yet that the assignees might maintain an action for goods sold and delivered against the defendants; and that the defendants could not set off the bill.⁵

The assignees also, as has been before stated, may adopt any contract of the bankrupt, though made by him *after* an act of bankruptcy, and may therefore sue the contracting party in *assumpsit*. Thus, where the bankrupt, after the act of bankruptcy, contracted with a factor (to whom he had

¹ *Nicoll v. Glennie*, 1 M. & S. 589.

² *Burra v. Clarke*, 4 Camp. 355.

³ *Hogg v. Mitchell*, 1 Star. 241.

⁴ 4 Camp. 355.

⁵ *Fair v. M'Peck*, 16 East, 130.

delivered goods for sale, and who had accepted a bill upon the strength of the goods) to return the bill to the factor, if he would return the goods to the bankrupt, and the bankrupt did accordingly return the bill,—the assignees were considered entitled to recover against the factor for the non-delivery of the goods.¹ But in a case, where East India stock was transferred by a bankrupt *after* his bankruptcy, it was held that the assignees could not, in order to recover the value of it, maintain an action for money had and received against the person to whom it was transferred; for such an action, it was held, would not lie, where *no money* has actually been received.² The proper form of action, in this instance, seems to have been a special action on the case.

Where counts for *money lent* and for money paid by the plaintiff *as assignee*, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him as assignee, it was held that these counts might well be joined, upon the special ground of the 5 Geo. 2, c. 30, s. 32,³ which provided that the creditors might direct where the money arising out of the bankrupt's estate might be paid in and remain—under which section the court was of opinion that it would be lawful for an assignee to lend; but that if no case could be put, where it would be lawful for him to do so, the declaration would have been bad.⁴

Where the bankrupt, who was an insurance broker, before his bankruptcy, effected on behalf of the defendant a policy with an insurance company, by which he covenanted to pay the premium; it was held that his assignees were entitled to recover the amount of the premium from the defendant in an action for work and labour, although the premium had not been actually paid, and although the assignees by their particulars of demand claimed to recover *for insurance*; but that the assignees could not recover the amount under the count for money paid, as the bankrupt had not paid the premium, or done anything which was equivalent to payment.⁵

In an action of *assumpsit*, unless there has been an express promise to the assignees, the right way of declaring is, to lay the promise to have been made to the bankrupt.⁶ But if

¹ *Butler v. Carver*, 2 Star. 433.

² *Nightingal v. Devisme*, 5 Burr. 2589; but see *Reed v. James*, 1 Star. 134.

³ And see 6 Geo. 4, c. 16, s. 102.

⁴ *Richardson v. Griffin*, 5 M. & S. 294.

⁵ *Power v. Butcher*, 10 B. & C. 329.

⁶ *Rig v. Wilmer*, 1 Str. 697. *Anon.* 6 Mod. 131. *Fashion v. Dormet*, 7 Vin. 139.

there has been any promise to the assignees, or any cause of action accruing since the bankruptcy, care must be taken to insert some count in the declaration adapted to such demand.¹

An averment that the defendant was indebted to the bankrupt before he became bankrupt, for goods sold and delivered by him "before he became bankrupt," is a sufficiently certain allegation of the time when the debt accrued.²

Where in an action by assignees against a defendant for goods sold by the bankrupt, the declaration contained counts on promises made to the bankrupt before his bankruptcy, and also on an account stated with the plaintiffs as assignees—to which the defendant pleaded a former action brought by the bankrupt upon the same promises before his bankruptcy, and still pending,—it was held, on demurrer, that the plea was bad—*first*, because the former action could not have been brought upon the account stated with the plaintiffs as assignees—*secondly*, because the assignees could not continue the former suit, even if they wished it.³ In *assumpsit* by the provisional assignee, where the defendant pleaded the general issue,—it was held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the general assignees, between the time of the issuing of the writ and the delivery of the declaration, was no ground of nonsuit upon a plea of *non assumpsit*. Whether it would have been an answer to the action, if specially pleaded, was left undecided.⁴

In an action of *covenant* for rent accrued since the bankruptcy, brought by the assignees against the bankrupt's lessee, the defendant is estopped from pleading that the bankrupt *nil habuit in tenementis*, nor can he force the assignees to set forth in the declaration their title to the land.⁵

An action of *debt* on a *simple contract* cannot be maintained by assignees against an *executor*.⁶ And in an action of *debt* by the assignees, on a bond given to the bankrupt to secure an annuity, for payments accruing after the bankruptcy, where it appeared that, before any payment of the annuity became due, the grantor lent the bankrupt a sum of money, on which it was agreed that the grantor should retain the

¹ Chitty on Pleading, vol. i.

² *Ferguson v. Mitchell*, 2 Cr. M. & R. 687.

³ *Biggs v. Cox*, 4 B. & C. 920.

⁴ *Page v. Bauer*, 4 B. & A. 345. S. C. nom. *Page v. Vaughan*, 2 Star. Evid. 167, n. (r.)

⁵ *Parker v. Manning*, 7 T. R. 537.

⁶ *Morgan v. Green*, Cro. Car. 187.

payments of the annuity as they became due until that sum was discharged;—it was held that this agreement and retainer might be properly pleaded, being considered equivalent to a plea of *solvit ad diem*.¹ In debt on a specialty, assignees need not make *profert* of the deed; because they are in by act of law, and may not have the means of obtaining the deed to set it forth or produce it.²

Where an action of *ejectment* was brought by assignees to recover the bankrupt's freehold property, and the demise was laid *before the bargain and sale* of the lands in question to the assignees, though, after the date of the commission, it was held that they were not entitled to recover; for the doctrine of relation back to the act of bankruptcy is applicable only to the assignment of the *personal* property of the bankrupt, and does not extend to the conveyance of his *freehold* property, which remains in the bankrupt, though not beneficially, until taken out of him by the bargain and sale.³ And though the day of the demise be laid even after the date of the bargain and sale, yet if this is *before the enrolment*, the demise will be equally bad; for the enrolment does not in bankruptcy relate back to the date of the bargain and sale.⁴

No action can be maintained by the assignees for a mere *personal* tort to the bankrupt, as for *assault*, or *slander*. But in the case of a tort to the *property* of the bankrupt, which may have *deteriorated its value*, (such, for instance, as running down a ship, or cutting timber,) whereby the assignees are deprived of the benefit which they would otherwise have enjoyed, the assignees may then sustain the action.⁵

So, where the bankrupt was an under-tenant of premises, for which he paid his rent regularly to his immediate lessor, who omitted to pay the superior landlord, and the latter distrained on the bankrupt; it was held that this was such an injury to the property of the bankrupt for which the assignees might sue, as it lessened the amount of the fund belonging to the creditors.⁶

And where the bankrupt had hired a carriage of M., and let it to B., who sent it back to the bankrupt damaged, and M., having repaired it with the bankrupt's assent, proved for the amount due; it was held that the assignees had a right of action against B., although the bankrupt's estate had paid no dividend.⁷

¹ *Sturdy v. Arnaud*, 3 T. R. 599.

² *Gray v. Fielder*, Cro. Car. 209.

³ *Doe v. Mitchell*, 2 M. & S. 446.

⁴ *Sir T. Jones*, 196. 1 Ventr. 360.
12 Mod. 3. Carth. 178.

⁵ *Evans' Statutes*, 329, 2nd edit.

⁶ *Hancock v. Caffyn*, 8 Bing.

358.

⁷ *Porter v. Vorley*, 9 Bing. 93.

Assignees cannot sue a party for revoking his submission to arbitration, made under an agreement entered into with the bankrupt before the bankruptcy; for the assignees themselves are not bound by that agreement, and there is consequently no mutuality between them and the other party.¹

It was doubted, however, whether the assignees could sue for a tort committed against the estate of the *provisional assignee*; but in one case they were permitted, even after two terms had elapsed, to amend the declaration, which stated the wrong to be done to the provisional assignee.²

Where a debtor to the bankrupt has paid money to a third person under due process of local law, he is not liable to an action by the assignees; therefore, though a creditor of the bankrupt attaching the effects abroad is, as we have seen,³ liable to refund to the assignees, yet the garnishee himself, of whom the debt has been so recovered, is not compellable to pay it over again.⁴

Where debts are under 40s. the assignees must, like other persons, sue for them⁵ in the court of requests.

If the statute of limitation is pleadable by a debtor in respect of his own debt against the bankrupt, the assignees may be barred by it likewise; and the time is to be computed from the date of the original cause of action, and not from the date of the commissioners' assignment.⁶ But an entry in a bankrupt's examination of a certain sum being due to A. is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute.⁷ But where a verdict is found for the assignees as plaintiffs in an action, it is no ground for setting aside the verdict, that it did not appear that the petitioning creditor's debt was contracted within six years before the suing out of the commission.⁸ Where the defendant, in an action by assignees, pleaded that the bankrupt *released* the debt before he became bankrupt, and issue is joined on this plea, which is found for the assignees—and it appeared also at the trial that the release was executed more than two months before the issuing of the commission, though after the defendant knew of the

¹ *Marsh v. Wood*, 9 B. & C. 59.

² *Freen v. Cooper*, 6 Taunt. 358.

³ *Ante*, 438.

⁴ *Le Chevalier v. Lynch*, Doug. 170; and see *Maudesley v. Parke*, cit. 1 H. B. 680.

⁵ *Keay v. Rigg*, 1 Bos. & P. 11.

⁶ *Gray v. Mendez*, 1 Str. 555. *South Sea Company v. Wymondsell*, 3 P. Wms. 143. *Ashbrooke v. Manby*, Comb. 70.

⁷ *Eicke v. Nokes*, 4 M. & S. 585. 1 Mood. 359.

⁸ *Mavor v. Pyne*, 3 Bing. 285. 2 C. & P. 91.

act of bankruptcy;—it was held, under these circumstances, that the assignees were not obliged to allege in their replication to the defendant's plea, that the defendant *knew* that the bankrupt had committed an act of bankruptcy before the execution of the release, but that it was sufficient to prove that fact¹ at the trial.

When an assignee dies, or is removed, we have seen² that no action then pending is thereby abated, but that it may be prosecuted in the name of the surviving or new assignees, upon his entering a suggestion of his death on the record, in pursuance of the 6 Geo. 4, c. 16, s. 67, and the rule for this purpose is absolute in the first instance.³ But, under the old law, if an order had been made to remove one of several assignees, and such order had not been followed up by an actual reassignment, or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners,—it was necessary for the removed assignee to join in the action; though, in an action of trover, the nonjoinder could only be pleaded in abatement; and the other assignees who sue might have recovered the proportional parts or shares of the property sought to be recovered.⁴ A new assignee may sue in debt upon a judgment recovered by a former assignee who has been removed, and may declare in a general form as having been *duly* constituted and appointed assignee, &c.⁵ And, under the old law, when one of several assignees was removed, and assigned his interest to the other assignees, they might maintain an action for money had and received against him, for money which came to his hands whilst he continued assignee.⁶ But now by 1 & 2 Will. 4, c. 56, s. 25, when an assignee dies or is removed, the personal estate vests in the new assignee by virtue of his appointment.

If the bankrupt, prior to his bankruptcy, has duly assigned his interest in a *chose in action* to a third person, the action must not be in the name of the assignees, but in the name of the bankrupt;⁷ for property, in which the bankrupt has only a *trust estate*, does not pass in any way to the assignees under the commission.

By 5 & 6 Vict. c. 122, s. 26, if the assignees commence any action or suit for any money due to the bankrupt before

¹ *Mavor v. Pyne*, 3 Bing. 285.
2 C. & P. 91.

² See ante.

³ *Westall v. Sturges*, 4 Mont. & P.
217. *Bates v. Sturges*, 7 Bing. 583.

⁴ *Blizam v. Hubbard*, 5 East,
407.

⁵ *De Cosson v. Vaughan*, 10 East,
61.

⁶ *Smith v. Jameson*, Peake, 213;
S. C. 5 T. R. 601. *Wray v. Barwis*,
Peake, 69.

⁷ *Carpenter v. Marnell*, 3 Bos.
& P. 40.

the time allowed for him to dispute the fiat shall have elapsed, the defendant may, after notice to the assignees, pay the same or any part thereof into court; and all proceedings with respect to the money so paid shall thereupon be stayed; and after the time given to the bankrupt to dispute the commission shall have elapsed, the assignees may have the same paid to them out of court.

Assignees are not restrained, any more than other persons, from bringing a fresh action after a nonsuit.¹

When one of several *partners* becomes bankrupt, it is provided by 6 Geo. 4, c. 16, s. 89, that the assignees may, upon obtaining an order for that purpose, prosecute any action in the joint names of such assignees, and of the remaining partner or partners.² In such a case, indeed, if any action *ex contractu* is brought in the names of *all* the partners, the bankruptcy may be pleaded in bar.³ And even where money is paid by solvent partners *after the bankruptcy of the others*, on account of the dealings of the general partnership, they cannot sue for it without joining the assignees of the bankrupt partners as plaintiffs.⁴ Where goods are *bonâ fide* delivered for a valuable consideration to a third person by the solvent partner, though after the act of bankruptcy of the other partner, the assignees of the bankrupt partner cannot maintain trover against the consignee of the goods; for the assignees are in such case tenants in common with the consignee, by relation from the time of committing the act of bankruptcy, and one tenant in common cannot maintain trover against another. And still less could the assignees maintain such action, when the consignee of the goods happened, also, to be the executor⁵ of the solvent partner.

But where the defendant, being in the employment of J. in his trade, and acting under a general authority, sold *bonâ fide* some goods belonging to J., after J. had committed an act of bankruptcy, of which the defendant was ignorant, and the sale was more than two months before the fiat issued, and the assignee brought trover to recover the value of the goods; it was held, *first*, on a plea of not guilty, that the defendant, having sold under a general authority only, had

¹ *Ex parte Hilton*, 1 Jac. & W. 467.

² And see *Thomason v. Frere*, 10 East, 61.

³ *Eckhardt v. Wilson*, 8 T. R. 140.

⁴ *Graham v. Robertson*, 2 T. R. 282.

⁵ *Smith v. Oriel*, 1 East, 367. *Fox v. Hanbury*, Cowp. 445; and see *Ramsbottom v. Lewis*, 1 Camp. 279.

⁶ *Smith v. Stokes*, 1 East, 363.

been guilty of a conversion, and that if he had any justification, he should have pleaded it specially; *secondly*, on an issue joined on a traverse of the assignees' possession,—that the plaintiff must recover, no evidence having been given that the purchaser was ignorant of the bankruptcy; the 81st and 82nd sections of 6 Geo. 4, c. 16, protecting the transfer only where the *party dealing with the bankrupt* is without notice, and the defendant being not the person *dealing with the bankrupt*, but merely the servant of the bankrupt who affirmed the sale, and who was bound therefore to prove its validity.¹

A., B., and C. carried on trade in partnership, and A. was also in partnership with D. A. being indebted to the firm of A., B., and C., before the dissolution of that partnership, unknown to D., indorsed a bill, and paid over money (belonging to A. and D.) in discharge of the private debt due from A. to A., B., and C., and immediately afterwards indorsed the same bill to a creditor of the firm of A., B., and C. The partnership between A., B., and C. having been dissolved, and A. and D. having afterwards become bankrupt, it was held that their assignees could not maintain trover against B. and C. for the bill, nor assumpsit for the money paid by A. out of the funds of A. and D. to A., B., and C., in discharge of his private debt.²

The assignees of two partners under *separate* commissions cannot recover in the *same action* a joint debt due from the defendant, and also separate debts due from him to each partner.³ But they may recover the *joint* debts.⁴ But where the plaintiffs sued as assignees of A. and B., and also as assignees of C. for a *joint debt* due to *all three partners*, (for which they could formerly, in strictness of law, only sue as assignees, either under three separate commissions, or under one joint commission against the three partners,)⁵ the declaration was held good, on motion in arrest of judgment after verdict; for it did not appear by the record, under *how many commissions* the assignees actually claimed.⁶ And assignees under a *joint* commission may recover in the same action debts due to the partners jointly, and debts due to them separately.⁷

In an action by assignees under a joint commission against

¹ *Pearson v. Graham*, 6 Ad. & E. 899.

² *Jones v. Yates*, 9 B. & C. 532.

³ *Hancock v. Haywood*, 3 T. R. 433.

⁴ *Ibid.*

⁵ A commission, however, may

now, by section 16 of the new act, be issued against one or more members of a firm.

⁶ *Streatfield v. Halliday*, 3 T. R. 779.

⁷ *Graham v. Mulcaster*, 4 Bing.

115.

A. and B., the declaration was for money had and received by the defendant to the use of A. and B. before they became bankrupts, and for money had and received to the use of the plaintiffs as assignees of A. and B. after their bankruptcy:—the evidence was, that A. committed an act of bankruptcy a few days before B. committed one, and that a clerk of the bankrupts *between* these acts of bankruptcy paid to the defendant 558*l.*, and *after both acts* of bankruptcy 5*l.* more;—it was held, that under this declaration the assignees were only entitled to recover the 5*l.* paid after the bankruptcy of both partners, and not the 558*l.* paid before the bankruptcy of B.; though it seems, that if they had declared for money had and received to their use *as assignees of A.*, they might then have recovered *one moiety* of the 558*l.* paid between the two acts of bankruptcy.¹

The property of a bankrupt being vested in his assignees by relation from the act of bankruptcy,—if a *sheriff*, therefore, take the bankrupt's goods in execution, and sell them after notice of an act of bankruptcy, the assignees may maintain trover² against him; and the same has been held in some cases, although the sheriff had no notice of the bankruptcy, and a commission had not been sued out at the time of execution.³ The assignees may also sue the sheriff in an action for money had and received.⁴ But they cannot have *trespass* for any act committed by the sheriff before the execution of the assignment—not even where the sheriff levies, or pays over the money, after an act of bankruptcy, of which he has notice;⁵ for trespass cannot be maintained, unless the plaintiff had *at the time* when the trespass is alleged to be committed, either an *actual* or a *constructive* possession of the thing which is the object of the trespass; and the assignees (though they have by the assignment a right given them which relates back to the act of bankruptcy, so as to avoid all mesne incumbrances) have not such a possession as to bring trespass for an act done before such right was given them; for no defendant can be made a trespasser

¹ *Smith v. Goddard*, 3 B. & P. 620; reversing *Balme v. Hutton*, 465. 2 Tyrr. 17.

² *Vaughan v. Wilkins*, 1 B. & Ad. 370.

³ *Price v. Helyar*, 4 Bing. 597. *Cartise v. Garland*, 7 Bing. 298. *Dillon v. Langley*, 2 B. & Ad. 131.

⁴ *Young v. Marshall*, 8 Bing. 43; and see *Hutton v. Balme*, 2 Tyrr.

⁵ *Cooper v. Chitty*, 1 Burr. 20. Bl. 65. *Lazarus v. Waltham*, 5 Moore, 313. *Smith v. Miles*, 1 T. R. 475. *Lechmere v. Thorogood*, Comb. 123. 1 Show. 12. 1 Mont. 474.

by relation.¹ But, where assignees on the issuing of the commission took possession of a farm which had belonged to the bankrupt, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and had continued in possession several months before the goods were seized by the sheriff under a *fi. fa.* issued at the suit of a judgment creditor; the court of King's Bench refused to stay the proceedings against the sheriff in an action of trespass.² The assignees, however, may also have *trover*, or *assumpsit*, either against the vendee of the sheriff—or the plaintiff in the original action, if he has received the money of the sheriff.³ Thus, where a bankrupt after the act of bankruptcy was arrested upon a *ca. sa.*, and placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant,—it was held that the assignees might recover the amount of money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical money raised by the pledge.⁴ The assignees may likewise bring *trover* against the plaintiff in the action, if he intermeddle with the sheriff in any way—such as by being in company with the officer at the time of the execution, or by giving a bond to the sheriff;⁵ and, in *trover* against the plaintiff, the sheriff need not be joined in the action.

Where after an act of bankruptcy the sheriff seized and removed the goods to a broker's, and the assignees afterwards served a notice upon him not to sell, in consequence of which the goods were never sold, but remained at the broker's,—it was held that the removal of the goods was a sufficient conversion, and that the notice did not amount to any admission that they had not been converted.⁶ So, where the goods were removed by the under-sheriff's agent,—this also was held a sufficient conversion by the sheriff.⁷ So, in a case where the sheriff legally took goods under one execution, the proprietor of which afterwards became bankrupt—and then sold enough to satisfy both that execution and also another

¹ Per Ashurst, J., 1 T. R. 480.

² *Bernasconi v. Fairbrother*, 7 B. & C. 379.

³ *Kitchin v. Campbell*, 3 Wils. 304. *Cole v. Davies*, 1 Ld. R. 724.

⁴ *Allanson v. Atkinson*, 1 M. & S. 583.

⁵ *Rush v. Baker*, 2 Str. 996. *Bull. N. P.* 41. *Menham v. Edmonson*, 1 Bos. & P. 369.

⁶ *Wyatt v. Blades*, 3 Camp. 396.

⁷ *Carlisle v. Garland*, 7 Bing. 298.

execution, which being delivered to him *after the act of bankruptcy* was void,—it was held that the sale of goods of greater value than was sufficient to satisfy the *first execution* was a tortious conversion, the sheriff having no right to sell more than was necessary; and that *trover* was the proper form of action by the bankrupt's assignees, to recover the value of such of the goods as were sold after the sheriff had raised money enough to satisfy the *first execution*.¹

Where the goods of a bankrupt, which were taken in execution, were discharged by payment of the sum to be levied by a creditor after a docket struck; it was held that the assignees subsequently chosen could not, by repaying that sum, maintain an action for money had and received against the sheriff.²

The sheriff, however, will be safe from any claim by the assignees, if he *levies before* the act of bankruptcy, and afterwards *pays* the money over to the plaintiff *without any notice* of the act of bankruptcy; for, as he has a right to levy, he is bound to pay over the money to the person at whose suit the execution is issued, the whole being considered in law as one act; and it would be inconsistent to say that he had *levied legally*, but had *paid it illegally*.³ And when the money has been paid over by the sheriff *before the commission*, the court will not assist the assignees upon motion, in giving effect to the relation of the bankruptcy,—so as to make the sheriff pay over to *them* money levied *after* an act of bankruptcy (by lying in prison), but *before* the time to *complete* the act of bankruptcy expired.⁴ The court, too, will in some cases even notice the fraction of a day in favour of the sheriff; as in a case where, after the sheriff took possession under a *fi. fa.*, the defendant at a *later hour* of the same day surrendered in discharge of his bail, and afterwards lay in prison the period of time sufficient to constitute an act of bankruptcy,—it was held that the sheriff having entered in fact before the time from which the bankruptcy was to be com-

¹ *Stead v. Gascoigne*, 8 Taunt. 527.

² *Bucher v. Booth*, 1 Mood. & M. 518.

³ *Vernon v. Hankey*, 2 T. R. 121, per Buller, J.; and see *Stead v. Gascoigne*, 8 Taunt. 527. It has been said that the court of Exchequer, in a case which is not reported, have held the sheriff liable in *trover*, though he seized, sold, and paid over the money

before the commission issued, and before any notice of it; saying, that this necessarily followed from the case of *Cooper v. Chitty*, for that it was an unlawful interference with another's goods cited in argument. *Potter v. Starkie*, 4 M. & S. 260. The seizure, however, in this case, must be understood to have been *after* the act of bankruptcy.

⁴ *Clarke v. Ryall*, Bl. 642.

puted, the assignees were not entitled to recover.¹ Where a sheriff's officer had seized under a *fi. fa.* goods more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to A. B., and to receive from him a certain sum as the full value of the goods, which he did *accordingly*, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees:—held, that they could not sue the *sheriff* for such residue,—as the officer did not derive his authority to sell the whole of the goods from the *sheriff*, but from the assignees.² And in all cases, if the *sheriff* acts fairly, and is under difficulties how to conduct himself, the court will endeavour to help him, as far as it is possible. Thus, if he is reasonably doubtful about the property, the court will give him time to make his return, or compel the parties to file a bill of interpleader, or oblige the assignees to prove the act of bankruptcy and the assignment.³ And in one case, where the *sheriff* was made a defendant, and neither the execution creditor, nor the assignees, would indemnify him, the court directed the declaration to be amended, by inserting the name of the execution creditor, instead of that of the *sheriff*, as the defendant; directing also that the defendant should plead *instante*, and admit upon the trial the taking of the goods; and that the *sheriff* should be discharged from all responsibility, upon selling the goods, and bringing the money into court, having apprized the parties of the time and place of sale; his right of poundage of course depending on the question whether the execution was warranted.⁴ The proper course for the *sheriff* to pursue (where both parties refuse to indemnify him) appears to be, to apply to the court for a rule to enlarge his return of the *fi. fa.* from time to time—or, if an action has been commenced against him, then for a rule to stay proceedings—until he is indemnified, or upon such other terms as the court may think the equity of the case requires.⁵ This rule, however, can only be a rule *nisi* in the first instance.⁶ The court will likewise, in favour of the *sheriff*, take his return of a writ

¹ *Thomas v. Desanges*, 2 B. & A. 586. And see *Godson v. Sanctuary*, 4 B. & Ad. 255.

² *Cook v. Palmer*, 6 B. & C. 739.

³ 1 Burr. 37.

⁴ *M'George v. Birch*, 4 Taunt. 585.

⁵ But see now 1 & 2 Will. 4, c. 58, s. 6. *Parker v. Booth*, 8 Bing. 85.

⁶ *King v. Bridges*, 7 Taunt. 294.

1 Moore, 43. *Ledbury v. Smith*,

1 Chit. Rep. 294. *Bernasconi v. Fairbrother*, 7 B. & C. 379.

as made at the time when it is made in fact, and not as at the return day specified in the writ. Thus, *nulla bona* will be a good return by the sheriff to a *fi. fa.* sued out against the bankrupt's goods, though it is returnable within twenty-one days from his lying in prison—if it be *not actually returned* until he has laid in prison the whole of the twenty-one days, and thereby become bankrupt.¹

But if the sheriff *voluntarily* take a part, and elect (either before or after the goods are sold) to which party he will pay the money—and receive also an express, or an implied, indemnity (for either is sufficient) from the party to whom he so elects to pay it over,—he must then resort to that party for security in case he is wrong; and the court will, in such case, not interfere in his behalf.² Nor will they interfere in an action of trespass against the sheriff for seizing goods which have been in the actual possession of the assignees several months after the issuing of the commission; for the sheriff is to be deemed then *prima facie* a trespasser, and must defend himself by showing that the commission is invalid.³ And where the sheriff had kept the proceeds of the goods in his possession for a length of time upon frivolous pretences, the court would not assist him by taking notice in a collateral way of a commission of bankrupt which afterwards issued, so as to stay proceedings against him in an action for a false return, pending which he paid the money to the assignees.⁴

Where to a writ of extent in aid against a bankrupt, sued out long after the issuing of a commission, the sheriff returned that the bankrupt was entitled to a sum standing in the name of the accountant in bankruptcy in the books of the Bank of England; that the accountant held the money in trust for the bankrupt, and that the sheriff had seized such money; and on this return the court of Exchequer made an order that the sheriff should pay over to the prosecutor of the extent the amount of his debt; on a petition by the sheriff to the court of review to order the money to be paid to him; it was held that the finding of the inquisition and the sheriff's return were alike erroneous, and the court, therefore, refused to make any such order.⁵

In trover against the sheriff by a third party, he may,

¹ *Coppendale v. Bridgen*, 2 Burr. 814.

² *Bernasconi v. Fairbrother*, 7 B. & C. 379.

³ *Aldridge v. Ireland*, cited 1 Taunt. 273.

⁴ *Timbrell v. Mills*, 1 Bl. 205.

⁵ *Ex parte Magway*, 2 M. D. & D. 671.

under the plea of not possessed, set up the title of the assignees.¹

Where the sheriff having paid over the proceeds of goods taken under a *fi. fa.* against a bankrupt, was sued in trover by the assignees, and gave notice to the execution creditor to defend the action, and, upon his refusal, let judgment go by default, and paid over the value of the goods to the assignees; it was held that the sheriff was not bound to defend the action, and that he might recover back from the creditor the money so paid, upon proving the validity of the bankruptcy.²

It is stated in one case, that where the sheriff *levied after the bankruptcy*, and the assignees had commenced an action against him, the court of King's Bench made the rule for staying proceedings and indemnifying him, upon the terms of his paying over the money levied, and the costs of the action up to the time of the application, *he being paid his poundage and the costs of the execution.*³ But this last condition seems rather an extraordinary one to impose on the assignees, if the fact was that the sheriff (as is stated) *levied after the bankruptcy*; for, if that was the case, the execution was altogether illegal, and he could then have no right to poundage.⁴

Where a plaintiff withdrew his execution against the bankrupt's goods, under a consent from him that there should be a fresh levy, if the debt were not paid within a given time—and the goods were afterwards seized under an execution at the suit of another plaintiff—upon which the first plaintiff placed his warrant in the hands of the second plaintiff's officer, who (the defendant having then become bankrupt) left in the possession of the assignees all the effects remaining, after satisfying the second plaintiff's execution to the exclusion of the first;—the court held, that though the effects were sufficient to satisfy both executions, the sheriff could not be compelled to return the first plaintiff's writ, until he should have been indemnified, and the prothonotary should have decided which of the parties should indemnify him.⁵

Actions against assignees.] With respect to actions against assignees, for anything done in pursuance of the act of 6 Geo. 4, c. 16, they must (by section 44) be commenced within

¹ *Leake v. Loveday*, 4 Man. & G. 972.

² *Austen v. Ward*, 1 Ry. & M. 116.

³ *Probinia v. Roberts*, 1 Chit. 577.

⁴ See *M'George v. Birch*, 4 Taunt. 585, and ante, 799.

⁵ *Burr v. Freethy*, 1 Bing. 71. And see now 1 & 2 Will. 4, c. 58, s. 6; and *Parker v. Booth*, 8 Bing. 85.

three calendar months next after the fact committed, and the assignees may plead the general issue, and give that act and the special matter in evidence at the trial, and that the same was done by authority of the act; and if it shall appear to have been so done, or that the action was commenced after the time above limited, the jury shall find for the defendant. And if there be a verdict for the defendant, or if the plaintiff be nonsuited, or discontinue his action after appearance, or if upon demurrer judgment shall be given against the plaintiff, the defendant is entitled to double costs.

The above section, however, only applies to an action against an assignee for an act *directed by the statute*, but done by him erroneously; and not to an act done by him as the result of his ownership of that which was the bankrupt's property, without any specific directions of the statute.¹

Therefore, where assignees entered the premises of a third person to seize goods which were the property of the bankrupt, it was held not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute."

If short bills are delivered by a banker, on the eve of his bankruptcy, to a third person, who receives payment and pays the money to the assignees, trover does not lie against them, but assumpsit.² But where the bills are handed over to the assignees, then trover will lie against them, although they received the proceeds before any demand is made on them.

If in an action to try the validity of a fiat, there is a plea of bankruptcy, and the replication, protesting the debt and the trading, deny that the plaintiff did become bankrupt, the issue is merely as to the act of bankruptcy.³

In replevin against assignees, they cannot be permitted in the same record to claim the goods as a distress for rent, and also to set up their title as assignees of the bankrupt.⁴

In an action of covenant against assignees on a lease, they may plead, 1st, that the lessee's interest did not pass to them; and 2ndly, that they renounced the term in time to be discharged from the performance of covenants.⁵

In a case where *trespass* was brought against assignees for seizing goods, which they contended were assigned fraudulently by the bankrupt to the plaintiff;—it was held by

¹ *Edge v. Parker*, 8 B. & C. 701.

⁴ *Emery v. Mucklow*, 10 Bing.

² *Tennant v. Strachan*, 1 Mood. 401.

⁵ *Thompson v. Bradbury*, 1 Bing.

³ *Cotton v. James*, 3 C. & P. 512. N. C. 326. 1 Scott, 278.

Gibbs, C. J., that the fraudulent conveyance was not of itself a sufficient defence, without proving an act of bankruptcy committed by the bankrupt.¹

Where an action was brought against assignees to recover the proceeds of a bill which had been specifically appropriated, it was held necessary to prove, that the produce of the bill came into the hands of the assignees, with a *knowledge on their part* of the purposes for which the bill was destined.²

When an assignee is not a creditor, and the bankrupt brings an action against him to dispute the bankruptcy, if the assignee is so much identified in interest with the bankrupt, that the action would not be properly tried if he defended it, the lord chancellor will order that the petitioning creditor shall have the conduct of defending the action.³

SECTION III.

Effect of the Bankruptcy on Suits and Actions previously commenced by, or brought against, the Bankrupt.

If the plaintiff or defendant in a suit in equity becomes bankrupt, it seems that the suit⁴ does not thereby absolutely abate, but the assignees may proceed in it in the name of the bankrupt. This point, however, has been differently ruled by Lord Thurlow, who was of opinion that the bankruptcy of a sole plaintiff so far put an end to the suit, that the assignees could not add to it by a mere supplemental bill, but that they must file another *original* bill, in the nature of a supplemental bill.⁵ But subsequent cases appear to have established the former decision of Lord Hardwicke, namely, that the suit does not abate by the bankruptcy of the party;⁶ in one of the cases, indeed, it is holden, that where a *defendant* becomes bankrupt, the plaintiff cannot even move to dismiss his own bill without paying costs.⁷ This, however, seems a

¹ *Young v. Wright*, 2 Marsh. 233. But *quære*, whether the conveyance being proved to be fraudulent, ought not of itself in this case to have been considered as an act of bankruptcy. See ante.

² *Kieran v. Johnson*, 1 Star. 109. *Quære* tamen; and see *ex parte Sayers*, 5 Ves. 169.

³ *Ex parte Stewart*, 2 Rose, 6.

⁴ *Anon.* 1 Atk. 263.

⁵ *Sellas v. Dawson*, 2 Anstr. 458, in note, and cit. C. B. L. 545. *Lingard v. Wegg*, 3 Bro. 435; and see *Harrison v. Ridley*, 2 Com. Rep. 589. Mitf. 62.

⁶ *Davidson v. Butler*, 1 C. B. L. 545. 2 Anstr. 460, n. *Tait v. Carrick*, *Bramhall v. Cross*, cit. *ibid.* *Williams v. Kinder*, 4 Ves. 387.

⁷ *Rutherford v. Miller*, 2 Anstr. 458.

great hardship upon the plaintiff; as the *defendant* may move to dismiss the bill *with costs* for want of prosecution, and thus compel the plaintiff to go on with the suit, although he may really wish to abandon it, and come in under the commission.¹

A plaintiff in equity is differently situated from a plaintiff at law—the judgment against the latter being only for the *costs*, whilst the decree against the former may be for an *account* likewise, and also to *pay a balance*. The assignees therefore of a plaintiff in equity, who has become bankrupt, are only permitted to take advantage of the proceedings by making themselves parties to the suit, and filing a supplemental bill; for a court of equity requires a substantive plaintiff, who may abide such decree as may be made.² Thus, though the suit is not (strictly speaking) abated, it becomes by the bankruptcy of the plaintiff defective. Upon a motion, however, to dismiss the bill for want of prosecution, the court has in some instances given the assignees a month to adopt the suit, by filing a supplemental bill, previous to a final application that the bill should be dismissed.³

The practice, as collected from the modern decisions, seems to be, to order a supplemental bill to be filed by the assignees within a fortnight, or some time not exceeding a month, or that the bill be dismissed without costs;⁴ and the proper mode of making the application is by special motion, of which notice should be given to the assignees.⁵ The practice in the Exchequer was the same, in this respect, as that of the court of Chancery.⁶ But in one case, where money was ordered by a decree to be paid to the plaintiff, who afterwards became a bankrupt, and he and his assignees applied by petition, that the money might be paid to the assignees—the sum being too small to bear the expense of a supplemental bill,—Lord Thurlow ordered it to be paid to the assignees, without such a bill being filed.⁷

An order *nisi* obtained by a defendant for dissolving an injunction will be made absolute, notwithstanding the plaintiff

¹ *Monteith v. Taylor*, 9 Ves. 615.

² 4 Ves. 388.

³ *Mumford v. Randall*, 1 Rose, 196; and see *Monteith v. Taylor*, 9 Ves. 616. *Sellers v. Dawson*, Dick. 738. *Ex parte Barry*, 1 Dick. 81. *Hall v. Chapman*, *ibid.* 348. 18 Ves. 424. 4 Madd. 171. *French v. Barton*, Whitm. 167.

⁴ *Wheeler v. Malin*, 4 Mad. 171. *Porter v. Cox*, Buck, 469. 5 Mad. 80. *Caddick v. Masson*, Sim. 501. *Sharp v. Hullet*, 2 Sim. & S. 496. *Lord Huntingtower v. Sherbon*, 5 Beav. 380, and cases there cited, in note.

⁵ Buck, 469.

⁶ *Fowler's Exchequer*, i. 286.

⁷ *Setcole v. Healy*, 2 Bro. 322.

becomes a bankrupt, unless the plaintiff shows cause.¹ And where a bill was filed by the plaintiff in the Exchequer for an injunction, and he afterwards became a bankrupt, the bill was upon motion ordered to be dismissed with costs for want of prosecution, the lord chief baron saying, that it was the course of practice in that court to charge the bankrupt with costs according to the circumstances of the case.²

After the usual decree for an account against executors, one of the defendants became bankrupt. The assignees by petition prayed, that they might be at liberty to go before the master upon taking the accounts, and be admitted on behalf of the bankrupt's creditors to support his discharge. The registrar declined drawing up the order, objecting that the suit being *abated* by the bankruptcy, the plaintiffs could not proceed in the accounts, until they had filed a supplemental bill in the nature of a bill of revivor,—and the lord chancellor upon this refused to make the order.³ Where assignees of a defendant have been brought before the court by supplemental bill, they are bound by all accounts taken before the bankruptcy, but not by those taken after it, and before they were parties;⁴ they will also be liable to the costs of the whole cause if they improperly resist the plaintiff's demand: but in a case where the plaintiff had made no application to them before filing the supplemental bill, the court did not give costs against them.⁵

In *actions at law*, also, though the bankruptcy of the plaintiff after action brought is strictly no absolute *abatement* of the suit,⁶ and the action has been occasionally permitted to be continued by the assignees in the name of the bankrupt,—yet this must now be taken, subject to the right of the defendant to *plead* the bankruptcy *in bar*; for where a defendant has a day in court to plead, and the means likewise of pleading the plaintiff's bankruptcy, the court cannot refuse to give effect to a legal defence of this nature.⁷

¹ 1 Atk. 263.

² *Davison v. Butler*, 1 C. B. L. 546.

³ *Russell v. Sharp*, 1 Ves. & B. 500. The reason assigned by the registrar in this case is *bad*, though the rule of practice was correct; for it has been sufficiently shown that the bankruptcy of a party is in equity no *abatement* of the suit.

⁴ *Ormsby v. Palmer*, 2 Molloy, 361.

⁵ *Whitcomb v. Minchin*, 5 Mad. 91.

⁶ *Bibbins v. Mantell*, 2 Wils. 358. *Hewitt v. Mantell*, *ibid.* 373. *Kretchman v. Beyer*, 1 T. R. 463. *Waugh v. Austin*, 3 T. R. 437. *Andrews v. Palmer*, 4 B. & A. 252.

⁷ *Kinnear v. Tarrant*, 15 East, 622. *Barnes v. Maton*, *cit. ibid.* 631. *Biggs v. Cox*, 4 B. & C. 920.

And such a plea may be pleaded even after the last continuance. Where the defendant, however, has no day in court to plead the bankruptcy in bar, there it will not operate in abatement of the suit; as where the plaintiff obtained interlocutory judgment before his bankruptcy, the action was held properly to proceed in his name during the execution of the writ of inquiry, and until final judgment,—on the ground, that after the award of the writ of inquiry, the defendant could not afterwards plead anything to the action.¹ In an early case in the books on this subject, where the plaintiff became bankrupt after he had recovered by *scire facias*, the court ordered the special matter to be entered, to entitle his assignees to the benefit of the judgment on the *sci. fa.*, without bringing a new *sci. fa.*² And in one case, where the parties were at issue, and notice of trial had been given, and the plaintiff before trial became a bankrupt, the court upon motion permitted the trial to go on in the name of the bankrupt, upon the assignees undertaking to pay the costs of suit, in case a verdict should be given for the defendant.³

But the defendant cannot apply for security for costs, until he has ascertained that the assignees have resolved to proceed with the action.⁴

The safest course appears to be,—when the action is commenced by the bankrupt previous to his bankruptcy, and is in such a stage of proceeding as will enable the defendant to plead the bankruptcy in bar,—that the assignees should not continue the proceedings in the name of the bankrupt, but bring a fresh action⁵ in their own names; for, if the defendant pleads the bankruptcy, the plea will be good, notwithstanding the plaintiff replies, that the proceedings are continued by the assignees in the name of the plaintiff for the use and benefit of the plaintiff's creditors, and not for the use of the plaintiff.⁶ After judgment, however, whether interlocutory⁷ or final, the assignees may make themselves parties to the record, by suing out a *scire facias ad inquirendum*, or *quare executionem non*, as the case may be; but they cannot do this in any intermediate stage of the

¹ *Bibbins v. Mantell. Hewitt v. Same*, supra; but see *Monk v. Morris*, Ventr. 193.

² *Plummer v. Lea*, 5 Mod. 88.

³ *Priddle v. Thomas*, cited 2 Wils. 373.

⁴ *Walkinshaw v. Marshall*, 4 Tyr. 993.

⁵ *Barnes v. Maton*, cit. 15 East, 631.

⁶ *Kinnear v. Tarrant*, 15 East, 624.

⁷ Per Wilmut, C. J., 2 Wils. 375. *Kretchman v. Beyer*, 1 T. R. 463.

proceedings.¹ Nor where a plaintiff even recovers judgment,—yet if the defendant brings a writ of error which is duly issued, allowed, and served before the plaintiff's bankruptcy,—can the assignees sue out a *scire facias* on the judgment; for it would be bad, either as a *scire facias quare executionem non*, or as a *sci. fa. to compel an assignment of errors*; as, in the first case, it would appear (from the recital in the *sci. fa.*) that a writ of error was depending,—and in the last, (independently of such recital,) there would have been a proceeding since the judgment.² But the assignees may sue out a *sci. fa.* on the recognizance against the bail; in which they should state, that an assignment was duly made to them of the bankrupt's estate and effects; though this omission can only be taken advantage of on special demurrer.³ And where a plaintiff after judgment became a bankrupt, and afterwards sued out execution, and the money was levied by the sheriff and brought into court,—the court in this case refused, *upon motion* of the assignees, to order the money to be paid to them,—but consented to detain it, that the assignees might take out a *sci. fa.* against the defendant to try the bankruptcy.⁴ In another case, however, (as we have already seen,) where the plaintiff had judgment on a *sci. fa.* the court, upon motion, dispensed with a fresh *sci. fa.*⁵

Where a bankrupt trustee died after charging the defendant in execution, the court of Common Pleas refused to discharge the defendant without the authority of the administratrix of the bankrupt.⁶

Where a *defendant* became bankrupt after the issuing and execution of a *fi. fa.*, but before the sale of the goods taken under it, and there was a variance between the *fi. fa.* and the judgment,—the court of King's Bench refused to allow the plaintiff to amend the *fi. fa.*, to make it conformable to the judgment.⁷

Where a plaintiff, being liable to the defendant for the costs of a nonsuit, issued a fiat against him, the court of Common Pleas refused to stay the defendant's proceedings in the action.⁸

¹ Per Buller, J., 1 T. R. 463.

² Ibid.

³ *Fletcher v. Pogson*, 3 B. & C. 192.

⁴ *Monk v. Morris*, Ventr. 193.
⁵ 1 Mod. 93.

⁶ *Plumer v. Lea*, 5 Mod. 88; ante, 754.

⁷ *Fothergill v. Walton*, 4 Bing. 711.

⁸ *Hunt v. Pasman*, 4 M. & S. 329; and see *Paris v. Wilkinson*, 8 T. R. 153.

⁹ *Eicke v. Nokes*, 1 Bing. N.

CHAPTER XIX.

OF THE EVIDENCE REQUIRED TO SUPPORT THE FIAT IN ACTIONS BY OR AGAINST ASSIGNEES.

- SECT. 1. *Where Notice is given to Dispute the Fiat.*
2. *Where a Party is not entitled to give such Notice.*
3. *Where no Notice is given, or is not required.*
4. *Where no Proof of the Title of the Assignees is necessary.*
5. *As to the Admissibility of the Depositions and Proceedings.*
6. *Of the Competency of the Bankrupt and his Wife as Witnesses.*
7. *Of the Competency of Creditors.*

(*As to Evidence on the hearing of Petitions, see post, "Practice on Petition."*)

It was formerly necessary in all actions, where the assignees either as plaintiffs or defendants claimed property under the bankrupt, to prove strictly the three requisites to support the commission: viz. the trading, the act of bankruptcy, and the petitioning creditor's debt,—as well as that the commission was regularly issued, and the assignment duly executed. Upon failure in proving any one of these matters, (the proof of which adds considerably to the costs of an action, and is often difficult to be established by strict rules of evidence,) the assignees were nonsuited, and thus frequently prevented from recovering a just debt due to the bankrupt's estate. To provide in some measure for this evil, the 49 Geo. 3, c. 121, ss. 10, 11, enacted, that the commission and proceedings should be evidence of the petitioning creditor's debt, the trading, and act of bankruptcy, unless the other party gave notice of his intention to dispute them. But this, it seems, did not afford an effectual check to the vexatious defence so frequently set up to actions brought by

assignees, notwithstanding the defendant was liable to pay the costs of forcing them to prove these several matters on the trial. The legislature, therefore, thought it expedient to enact, that in certain cases *no such proof* should be required from the assignees; and in others, that the *depositions* of these matters before the commissioners shall be *conclusive evidence*; confining, in reality, the former general obligation of proof under the old system, to what may now be considered as excepted cases under the new.

Thus, by 6 Geo. 4, c. 16, s. 90, it is declared, that in any action by or against an assignee—or any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant—*no proof* shall be required at the trial of the *petitioning creditor's debt, the trading, or act of bankruptcy*, unless the other party in such action shall (if defendant, at or before pleading—and, if plaintiff, before the issue joined,) give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters. And the party giving notice renders himself liable to the costs occasioned by it, if the disputed matter is proved by the other party upon the trial.

By section 91, also, a similar provision is made as to suits in equity by or against the assignees, unless the party in the suit shall, within ten days after rejoinder, give notice in writing to the assignees of his intention to dispute; in which case, if the assignees shall prove the matter so disputed, the costs occasioned by the notice are, in the discretion of the court, to be paid by the party giving it.

These two clauses, it will be perceived, are not (like those in the former statute)¹ confined to actions and suits by or against the *assignees*, but extend to those against the *commissioners, or any person acting under them*. There is, also, a material difference in the enactments; the former statute providing, that in case of no notice being given, "*the commission, and the proceedings of the commissioners under the same, shall be evidence to be received*" of the petitioning creditor's debt, the trading, and act of bankruptcy—while the present statute declares, that "*no proof* shall be required at the trial" of those matters.

But when the assignees sue for a debt or demand for which the bankrupt might himself have sued, the 5 & 6 Vict. c. 122, takes away from the defendant *all power* whatever of contesting those proceedings *after a certain period* allowed the

¹ 49 Geo. 3, c. 121, ss. 10, 11.

bankrupt to dispute the validity of the commission; for by section 24 it is declared, that if the bankrupt shall not (if he be within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe) within three months after such advertisement, or (if elsewhere) within twelve months, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing the advertisement is declared to be conclusive evidence in all cases as against the bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or dividend for which the bankrupt might have sustained any action or suit, had he not been adjudged bankrupt, that he became a bankrupt before the date and suing forth of the fiat, and that the fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date.

In treating of these several enactments, it is proposed to consider, *First*, the evidence necessary to be adduced by the assignees where the defendant is entitled to give, and does give, due notice to dispute the petitioning creditor's debt, or any of the other requisites to support the commission.

Secondly, Where the defendant is not entitled to give such notice.

Thirdly, Where no notice has been given by him.

And *Lastly*, To consider those cases, where the defendant is, by his own acts, wholly estopped from disputing the title of the assignees.

SECTION I.

Where the Defendant is entitled to give, and does give Notice to Dispute the Fiat.

In all actions brought by the assignees for any debt or demand, for which the *bankrupt might himself have sued* if he had not been bankrupt, the defendant will only be entitled to give notice to dispute the fiat within the same periods as those allowed the bankrupt for the same purpose; in *other actions*, the defendant may use his own discretion in giving such notice; but he does so in each case at the hazard of costs. The defendant, however, can only give notice in actions where the *assignees*, or *commissioners* or the *persons acting under their warrant*, are parties to the action. For in an action between *third persons*, if the validity

of a commission of bankruptcy comes incidentally into question as a ground of defence, it must be regularly proved in the former manner required by law.¹ But the statute is not limited to cases where the assignees, or the commissioners, are *named as such* upon the record; but extends to actions, where the opposite party knows that they make out their title, or their justification (as the case may be), under the commission.² For before the 6 Geo. 4, c. 16, though the assignees might not have stated themselves to be such in the declaration, yet if they had no title to recover, except *as assignees*, they were held bound to prove the petitioning creditor's debt, and the other requisites to support the commission.³ The statute, also, is not confined to the case where the assignees are the *only defendants* on the record; for if there are other co-defendants who justify as their servants, the statute equally applies.⁴

As to the *form* of the notice,—the notice should specify which of the three matters, viz. the trading, the petitioning creditor's debt, or act of bankruptcy, it is intended to dispute; a notice that the defendant intends to dispute *the bankruptcy* is too general.⁵

As to the *time* of giving the notice,—the statute, it will be observed, in actions at law, requires the notice on the part of the *plaintiff* to be given before issue joined. A notice, therefore, delivered at the time of delivering the issue with notice of trial, is clearly sufficient.⁶ The notice by the *defendant* being required to be given at or before pleading,—if he has therefore *omitted* to give notice *before pleading*, and means to dispute the several matters above specified, the regular course is to apply to the court for leave to withdraw his plea, and plead *de novo* with such notice; the last plea will then be considered the plea of the party to all purposes, and on notice given at the time of pleading, it will be a sufficient compliance with the statute.⁷ But, without an application to the court, he cannot regularly withdraw a plea once pleaded, and deliver it again with a notice, though the time for pleading has not even expired.⁸ So, in a suit in equity, the defendant has (by analogy to the practice at law) been permitted to with-

¹ *Doe v. Liston*, 4 Taunt. 741.

² *Simmonds v. Knight*, 3 Camp. 251. *Rowe v. Lant*, Gow. 24.

³ Cowp. 570.

⁴ *Gilman v. Cousins*, 2 Star. 182.

⁵ *Frimley v. Unwin*, 6 B. & C. 537.

⁶ *Richmond v. Heapy*, 4 Camp. 207.

⁷ *Willock v. Smith*, 2 Camp. 184.

Clarkson v. Doodds, *ibid.* n. *Decharme v. Lane*, 2 Camp. 324. *Radmore v. Gould*, Wightw. 80. *Gardner v. Slack*, 6 Moore, 489.

⁸ *Poole v. Bell*, 1 Star. 328.

aw his rejoinder, and rejoin *de novo* for the purpose of giving notice; but the court require from him an affidavit, at (according to his information and belief) it is essential to the justice of the case.¹ But, as this is merely an indulgence to the defendant,—in a similar case where the witness the act of bankruptcy was dead, the permission was only granted, upon terms of admitting the deposition of the deceased witness.²

With respect to the *service* of the notice,—service on the signees in person is not necessary, a delivery of the notice to their *attorney* being the best for all practical purposes, and being also the proper mode of service; for leaving it to a *servant* at the dwelling-house even of the assignee is not a good service.³ But this last point has been differently held by Lord Tenterden, who has held that notice left with a clerk of the assignee at his counting-house is sufficient, before issue joined.⁴ In a suit in equity, service of the notice may be proved by affidavit upon the hearing of the case.⁵ The notice on the part of the defendant is not to be considered as part of his evidence in the cause, but should be proved at the beginning of the trial; and as soon as the commission and proceedings are produced by the plaintiff, the court will then immediately compel the latter to support the commission, in the same manner as he was formerly obliged to do, viz. by strict proof of the petitioning creditor's debt, and the other requisites.⁶

With respect to proof of the *petitioning creditor's debt*, as to the *validity* of which the reader is referred to a former chapter,⁷—it must be proved, in the first place, to have been contracted *prior to some* act of bankruptcy committed by the bankrupt;⁸ and it requires also to be substantiated by the same kind of evidence, as would be required in an action by the creditor against the bankrupt himself. Therefore, where the debt arose upon a bond, an acknowledgment by the bankrupt to a witness, that he owed the debt upon which the commission was sued out, will not supersede the necessity of calling the subscribing witness.⁹ So, if the debt of the petitioning creditor is on a bill of exchange, drawn by the bankrupt and indorsed by him to the petitioning

¹ *Berks v. Wigan*, 1 V. & B. 221.

² *Brickwood v. Miller*, 1 Meriv. 6.

³ *Howard v. Ramsbottom*, 3 Taunt.

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⁵ *Widger v. Brouning*, 1 M. & 27.

⁶ 6 Geo. 4, c. 16, s. 91.

⁷ *Decharme v. Lane*, 3 Camp. 324.

⁸ See ante, Ch. iv.

⁹ See section 19. *Ex parte Wainman*, C. B. L. 23.

¹⁰ *Abbott v. Plumbe*, 1 Doug. 216.

creditor,—besides adducing evidence that it was indorsed before the commission,—it will be necessary, in order to prove the debt, to go regularly through the several proofs required in an action by an indorsee against the drawer. For instance, it must be shown that the drawer had sufficient notice of the dishonour of the bill, or that the notice of the dishonour was, under the circumstances of the case, dispensed with. And, for this purpose, an acknowledgment by the bankrupt (the drawer) in a conversation between him and the petitioning creditor (the indorsee or payee)—that the bill would not be paid, but would come back to him—has been deemed sufficient evidence, although the acknowledgment was made *after* the act¹ of bankruptcy. So the date of a promissory note, which was relied on as the petitioning creditor's debt, (where the note was *made* by the bankrupt *prior* to the act of bankruptcy,) has been considered as presumptive evidence that the note existed before the act²—though in this case it was held, that no declaration of the bankrupt *subsequent* to his bankruptcy would be admissible in evidence to prove it. But where the petitioning creditor had, upon an application for a loan from a bankrupt, delivered to him a check on his bankers for 100*l.*, which check had got back again to the hands of the petitioning creditor, as if satisfied, but he was unable to give positive proof that the check was *actually paid*,—the check of itself was in this case held not sufficient evidence of a petitioning creditor's debt.³ So, where the proof of the debt rests merely upon the *primâ facie* evidence of the acceptance of a bill of exchange by the bankrupt, and the defendant gives the assignees notice to prove the consideration, it will be advisable for them to do so; for, though a plaintiff generally is not bound to prove the consideration for the defendant's acceptance, yet if there are circumstances of suspicion as to the consideration, and the plaintiff has notice that he will be required to prove it, the jury may pronounce the debt conclusive, though no direct evidence is given to impeach the acceptance; for they have a right to require, from the aspect of the whole transaction, something to corroborate the *primâ facie* proof of hand-writing.⁴ And where the petitioning creditor is the *indorsee* or *payee* of a bill or note, the *date* of the instrument then affords no presumption as to the commencement of the debt; but the actual *time* of the in-

¹ *Brett v. Levett*, 13 East, 213.

³ *Bleasby v. Crossley*, 2 Carrington.

² *Taylor v. Kinloch*, 1 Star.

& P. 213.

176.

⁴ *Abraham v. George*, 11 Price, 423.

dorsement or the acceptance in this case is material, and ought to be satisfactorily proved.¹

Where a sufficient petitioning creditor's debt on two bills of exchange was legally proved before the commissioners, the subsequent loss of either bill affords no ground to impugn the commission in an action by the assignees.²

An acknowledgment by the bankrupt, that he owed the petitioning creditor 100*l.* before the act of bankruptcy,—though such acknowledgment might be made on the very day the act of bankruptcy was committed, or indeed at any time before the suing out of the commission,—was held by Lord Kenyon sufficient evidence of the existence of the debt.³ But this position, as well indeed as the case of *Brett v. Levett*, appears to be considerably shaken by subsequent decisions; in which the rule seems to be laid down, that declarations or admissions made by the bankrupt *after* the act of bankruptcy, are not admissible evidence on the part of the assignees in support of the commission.⁴ And where, on an indictment against a bankrupt, the petitioning creditor's debt was alleged to be due to A., B., and C., surviving executors of D.,—it was ruled to be necessary (besides proving them to be executors) to show that they *all assented* to act in discharge of the trust,—and that a general admission by the bankrupt, of a debt due to the executors of D., would not supply the defect.⁵ But, as the bankrupt's declarations before the act of bankruptcy are admissible evidence in support of the petitioning creditor's debt, so they are likewise evidence to disprove it. Thus, in an action by the assignees against the sheriff, the bankrupt's declarations before the bankruptcy,—showing that the commission had been founded in a collusion between himself and the petitioning creditor, to create an apparent petitioning creditor's debt,—are receivable in evidence against the assignees, though the petitioning creditor was not one of the assignees under the commission.⁶

An entry in the bankrupt's books,⁷ or an account signed by the bankrupt,—in either of which he charges himself with a balance brought over on a day *before* the bankruptcy,

¹ *Rose v. Rowcroft*, 2 Camp. 245.
Cowie v. Harris, 1 M. & M. 141.

² *Pooley v. Millard*, 1 Tyrr. 331.

³ *Downton v. Cross*, 1 Esp. 168.

⁴ *Robson v. Kemp*, 4 Esp. 233.
Watts v. Thorp, 1 Camp. 376. *Taylor v. Kinlock*, 1 Star. 176. *Smallcombe*

v. Bruges, 13 Pri. 136. *Sanderson v. Laforest*, 1 Carr. 46.

⁵ *Rose v. Barnes*, 1 Star. 243.

⁶ *Thompson v. Bridges*, 8 Taunt. 336. 2 Moore, 376.

⁷ *Ewer v. Preston*, Rep. temp. Hard. 378. *Watts v. Thorpe*, *supra*.

—will be admissible evidence of the debt, provided it is shown that the entry was *made*, or the account *allowed*, by the bankrupt *before the bankruptcy*; but this must be proved by extrinsic evidence, and independent of the writing.¹ It will not, however, in any case be absolutely necessary to prove, that the debt continued from the period when it was so admitted, down to the time of the bankruptcy; for when it is shown to have once existed prior to the act, its continuance will be presumed.² But where it was necessary to prove a good petitioning creditor's debt on the 20th May,—it was held not sufficient to show, that on the 20th January preceding a sum of 700*l.* was due from the bankrupt,—there being *subsequent* receipts and payments and other continuing transactions between the petitioning creditor and the bankrupt; for, after a period of three months, it was considered impossible to say, under these circumstances, whether 1000*l.* or 5*l.* was really due.³

Where a petitioning creditor's debt was to be proved, by a deed of reference between himself and other persons (with whom he had been in partnership, and one of whom was the bankrupt) of all accounts between them, or any two of them, and also by an award of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor;—it was held that it was not sufficient to prove the execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution of it by the *other partners*, by whom it appeared on the face of it to have been executed; for that the consideration of each to execute his own submission was the submission of all the others; and without proof of that, the arbitrators had no authority to make their award between any of the parties.⁴

Where the action is between *third parties*, but the assignees are virtually parties to the suit—as in an action by a third person against a sheriff for a false return of *nulla bona*, which the assignees give instructions to defend, on the ground that at the time of the levy the party was a bankrupt—a declaration by the petitioning creditor (who was also in this case one of the assignees) made even *subsequent* to the suing out of the *commission*, that the bankrupt did not in fact owe him 100*l.*, has been held admissible evidence of there being no petitioning creditor's debt to support the commission; on

¹ *Hoare v. Coryton*, 4 Taunt. 560.

² *Jackson v. Irwin*, 2 Camp. 50.

³ *Gresley v. Price*, 2 Carr. & P. 48.

⁴ *Antram v. Chace*, 15 East, 209.

the ground that, though the petitioning creditor once swore to the existence of a debt of 100*l.*, he might, upon a further investigation of the accounts, have found that he was mistaken.¹ And in a similar case, where the petitioning creditor was not one of the assignees, Sir J. Mansfield said, "he had no doubt that the admission of a petitioning creditor, as to any fact respecting his debt, was good evidence against the debt."² These decisions are, however, contrary to the principle laid down by Lord Eldon in several cases, viz. that the petitioning creditor is pledged to the validity of the commission, and ought not to be permitted to controvert a proceeding which originates from himself;³ and they are also inconsistent with two other cases in the Common Pleas, where it was held that the petitioning creditor was estopped, by his affidavit of debt on suing out the commission, from contending afterwards that the debt was insufficient to support it.⁴ And though some of these cases appear to have been decided on the principle of estoppel, and others on that of the competency of a witness, it does really seem impossible to reconcile the decisions.

Where an order by the lord chancellor to substitute a new petitioning creditor's debt was made after an action had been commenced by the assignees, it was doubted whether it would be sufficient evidence of the debt on the trial of the action.⁵

Where a debt has been substituted for the petitioning creditor's debt, under the 6 Geo. 4, c. 16, s. 18, it is sufficient to prove the petition to the court of review for the substitution of the debt, the order of the court referring the sufficiency of the debt to the commissioner, and the finding of the commissioner thereon; it is not necessary to produce the order of the court confirming such finding.⁶

With respect to the different trades and callings, which *eo nomine* render a man liable to be made a bankrupt, and the different acts which constitute in law a *trading*, the reader is referred to a former chapter.⁷ It may suffice here to observe, that where particular employments or callings are not specified in the statute, the general description in it of persons

¹ *Dowden v. Fowle*, 4 Camp. 38.

² *Young v. Smith*, 6 Esp. 121.

Harmer v. Davis, 1 Moore, 300, contra.

³ *Ex parte Glossop*, 2 Rose, 386.

Ex parte Jackson, *ibid.* 188. *Ex parte Graves*, 1 G. & J. 86.

⁴ *Harmer v. Davis*, 7 Taunt. 577.

Ledbetter v. Salt, 4 Bing. 623.

⁵ *Muskett v. Drummond*, 10 B. & C. 161.

⁶ *Batchelor v. Fyfe*, 1 Mood. & R. 331.

⁷ Chap. ii.

liable to become bankrupt cannot be satisfied, unless there be proved acts *both of buying and selling*,¹ or of buying and letting for hire—except, indeed, where the trading sought to be established is by any of the general modes of trading specified in the statutes—such as the using the trade of merchandize by way of *commission*,² or by the *workmanship of goods or commodities*—in which case, *both* the acts of buying and selling, or of buying and letting for hire, may be held unnecessary to be proved. And whether a person of a particular description has used the trade of merchandize in the sense which the legislature has affixed to the term—or whether a person once in trade has actually ceased his trading—are both questions for the determination of the judge upon the several facts found by the jury. If a man buys, and represents himself as a dealer, and offers goods in exchange, it may then be left to the jury to say whether he did not buy to sell again.³

Where the person belongs to a class which is *excluded* by the statute, as if he is a farmer, (who may notwithstanding, as we have formerly seen, be a bankrupt, though not in the capacity or character of a *farmer*)—the question for the jury will be, whether the acts of buying and selling were incident to the enjoyment of the farm, or were done collaterally, and with a view to profit.⁴ To resolve this question, the important consideration will be, what was the nature of the acts themselves, and the use to which the bought articles were applied. The acts of buying and selling may be so frequent and so extensive, as evidently to have no reference to the business of *farming*; and may also be transacted so publicly, and with such a manner and semblance of trafficking, as to show a manifest intention in the party to hold himself forth as a *general dealer* in the articles bought and sold. On the other hand, they may be only occasional acts, or incidental to the occupation of the farm; in which case, the supposition of his being a general dealer in those articles, or of seeking his livelihood by buying and selling them, will be wholly negatived. Buying, also, for the express purpose of selling again, is not decisive of the question, (though in one case great stress

¹ See 6 Geo. 4, c. 16, s. 2, and Lord Ellenborough's judgment in *Sutton v. Weeley*, 7 East, 448.

² Before the 6 Geo. 4, c. 16, a person receiving a *commission* from a merchant for the orders he procured for goods, and not being debited with the goods himself, the goods

being supplied by the merchant to the customer, was held not to be a trader. Per Abbott, C. J., *Doe v. Lawrence*, 2 Car. & P. 135.

³ *Millikin v. Brandon*, 1 C. & P. 380.

⁴ *Stewart v. Ball*, 2 N. R. 79.

was laid upon such evidence,)¹ for it may be incidental to the occupation of the farm, and to the farming business. The true question, indeed, will always be, whether the farmer bought with a view to make a profit as a trader, independently of the occupation of his farm.²

Under the words "*dealer and chapman*," commonly used in a commission, and the general statement that the bankrupt got his living by *buying and selling*, evidence may be given of any species of trading.³ Thus, where such general words were used in a commission, evidence of "*dealing in hops*" was held admissible, though the commission described the bankrupt as "*a dealer in cattle*."⁴ And even where the general words "*dealer and chapman*" are omitted, proof of any other species of trading may be given.⁵ And an acknowledgment by the bankrupt, that he was in *partnership with another* as a trader, coupled with proof of his having given directions in the concern, has been held sufficient evidence to constitute a trading, though no express act of buying and selling during the partnership, as to *him*, could be established in evidence.⁶ In a late case, however, at *nisi prius*, Lord Chief Justice Best entertained some doubt as to the correctness of this decision, though he received the proof, giving the defendant leave to move to enter a nonsuit.⁷

The next fact to be proved is, that the bankrupt has committed an *act of bankruptcy*. The several acts of bankruptcy, some one of which it will be necessary to establish in evidence, have been already enumerated in a former part of this work.⁸ The greater portion of them, and indeed *all* those specified in the 3rd section, must be "*with intent to defeat or delay creditors*;" therefore the *intention* of the party in doing the act, and *not the consequence* of it, is the criterion to determine whether it amounts to an act of bankruptcy or not. Thus, though no creditor be *in fact* delayed, still the conduct of the party plainly manifesting an *intention* to delay his creditors, will constitute a positive act of bankruptcy,⁹ which does not require the intent to be productive of the effect: the in-

¹ *Bartholemew v. Sherwood*, 1 T. R. 573, in note; but see *Stewart v. Ball*, 2 N. R. 81, per Chambre, J.

² *Patten v. Browne*, 7 Taunt. 409.

³ *Ex parte Herbert*, 2 Rose, 248.
2 V. & B. 299. *Hale v. Small*, 2 B. & B. 25. *Bernasconi v. Forebrother*, 10 B. & C. 549.

⁴ 2 B. & B. 25.

⁵ *Smith v. Sandilands*, 1 Gow, 171.

⁶ *Parker v. Barker*, 1 B. & B. 9.
3 Moore, 226.

⁷ *Bromley v. King*, 1 Ryan & M. 228.

⁸ Chap. iii.

⁹ *Ante*, 47.

tention will be, of course, more or less apparent, according to the varying circumstances of each particular case. In general, the previous conduct of the bankrupt, and his declarations *at the time* of the state of his affairs, are the strongest indications of what his motive is, in doing or suffering the act insisted upon as an act of bankruptcy. And though the delay of creditors was not the *immediate* or *principal* object of the party, yet (as has been before remarked)¹ if that proves to be the *necessary consequence* of his proceeding, it will be evidence of his intent, upon the principle that every man must be presumed to foresee and intend what is the inevitable consequence of his own act.²

The act of bankruptcy by *beginning to keep house*, we have before seen,³ is usually proved by *denial* to a creditor when the party is at home, such denial being authorized by the bankrupt. But this, it will be recollected, is merely as a medium of proof, and is not the *only* evidence of the fact; for if a trader has no clerk or servant, the act cannot in that case be evinced through such a medium. Therefore, where a trader shuts himself up in his house, or secludes himself in any private apartment, for the purpose of avoiding the fair importunity of his creditors, who are thus deprived of all means of communicating with him, he *begins to keep house* within the meaning of the statute, and commits an act of bankruptcy.⁴ For the denial to the creditor, as it is the cause of delay to him, is merely (like every other act which necessarily produces such a consequence) presumptive evidence of the bankrupt's *intention* to effect that delay, and not (abstracted from all intention and design) a specific act of bankruptcy in itself. A denial to several persons whom the bankrupt's servant did not know, but whom from their frequent calling she believed to be creditors of the bankrupt, is evidence to go to the jury, to say whether they were so or not;⁵ as well as a denial to only *one* person calling to make inquiries about a dishonoured bill of exchange, and whom the bankrupt believed to be a creditor.⁶ So, it is for a jury to say whether the bankrupt denied himself for the real

¹ See ante, 45.

² Per Lawrence, J., *Fowler v. Padgett*, 7 T. R. 516. Per Lord Ellenborough, *Ramsbottom v. Lewis*, 1 Camp. 279. Per Gibbs, C. J., *Holroyd v. Whitehead*, 3 Camp. 530.

³ See ante, 52.

⁴ *Dudley v. Vaughan*, 1 Camp. 271. *Castell's Bankruptcy*, cit. per Bayley, J., 388; and see ante, 52.

⁵ *Jameson v. Eamer*, 1 Esp. 381.

⁶ *Bleasby v. Crossley*, 2 Car. & P. 213.

purpose of delaying his creditor, or because he called at an unreasonable hour.¹

The *declarations* of the bankrupt made before his bankruptcy, as to the existence of the petitioning creditor's debt, we have seen,² are receivable in evidence as an admission of the debt; for the bankrupt then had no interest to make such admission; therefore the same objections do not apply to this evidence, as to that given *after his bankruptcy* in support of the commission. Accordingly the bankrupt may allow his attorney (employed by him *before his bankruptcy*) to give in evidence privileged communications *then* made, though offered in proof of the act of bankruptcy.³ But, in an action brought by the bankrupt against an assignee to try the validity of the commission, any admission of the bankrupt, though made *after* the bankruptcy, would be evidence against the bankrupt himself. So, the bankrupt's declarations at the time of his departing from his dwelling-house, or absenting himself, are (as we have seen) properly received in evidence, as showing the nature of his absence; though, in strictness, the declaration should accompany the act—or, at least, if not precisely contemporaneous, it should be so connected with it, that the declaration may be properly considered as the result and consequence of the coexisting motives.⁴ Thus, any letter of the bankrupt written previous to his bankruptcy, and nearly contemporaneous with the act done by him, is admissible in evidence, to explain the motives of the act. So, in an action by assignees to recover sums paid by the bankrupt as a fraudulent preference, declarations made by the bankrupt about the time of the transaction, but not accompanying any act, are admissible to show under what circumstances, and why the payment was made.⁵ And in a very recent case at *nisi prius* (which was an action brought by assignees to recover back money paid to a defendant on the ground of a fraudulent preference), Lord Chief Justice Best acted up to the full extent of this principle, by admitting a letter of the bankrupt in evidence (though written five months before the commission issued) explaining the embarrassed state of his affairs—in order to show that, when the bankrupt made the particular payment

¹ *Hughes v. Gillman*, *ibid.* 32;

⁴ 2 Phill. Ev. 287.

and see *ante*, 57.

⁵ *Vacher v. Cocks*, 1 Mood. & M.

² *Ante*.

354.

³ *Merle v. More*, 1 Ry. & M. 390.

2 C. & P. 275.

in question to the defendant, he had his bankruptcy then in contemplation.¹ The general rule, however, and the most correct one, appears to be, that the declarations of a bankrupt ought not to be admitted to explain any *past* transaction, which at the time of making the declaration was completely finished.² For to admit such declarations would be, in effect, to receive (as Mr. Phillipps justly observes)³ an admission by the bankrupt, that he had committed an act of bankruptcy—a fact which the bankrupt himself would not be allowed to prove; and yet it would be much less dangerous to hear the bankrupt's own account upon his oath, than his bare relation to third persons at second-hand.

The balance-sheet of a bankrupt, given on oath under the fiat, is not admissible against him on a criminal charge.⁴

It may be proper, under this act of bankruptcy, to consider in what cases the *bankrupt's declarations* are receivable in evidence; which are admitted only upon the principle, that what a party says at the time of doing an act is evidence for the purpose of showing its true nature and character. Thus the declarations of a bankrupt at the *time of quitting* his dwelling-house, or immediately subsequent, are admissible in evidence, in order to show the motive of his departure; for it is the *intent* with which he departed that constitutes the act of bankruptcy.⁵ So, where a bankrupt absented himself from his dwelling-house on the 16th of February, letters written by him on the 16th of January to the holders of bills to become due in February, were held to be admissible, for the purpose of showing him to be in embarrassed circumstances, and as tending to give a colour to the motive of his absence.⁶ So, his order to a servant to deny him to a *creditor*, is (as we have before seen), for the same reason, evidence of the intent of his being denied. The declarations, also, of the bankrupt *the day after his return home*, have been held admissible in evidence of the motive of his absence;⁷ for, as the whole absence from his dwelling-house is but one act of bankruptcy, there seems to be no reason why declarations made so soon after his return should not be considered as much a part of the transaction, as declarations made just previous to his departure. And it has been well observed by the late Sir W.

¹ *Bacon v. Maine*, cor. Best, C. J., Sittings Guildhall after Trin. T. 1826.

² *Robson v. Kemp*, 4 Esp. 233.

³ Vol. ii. 287.

⁴ *R. v. Britton*, 1 Mood. & R. 297.

⁵ *Ambrose v. Clendon*, Rep. temp. Hard. 267.

⁶ *Smith v. Cramer*, 1 Bing. N. C.

585. 1 Scott, 541.

⁷ *Bateman v. Bailey*, 5 T. R. 512.

Newman v. Stretch, 1 Mood. & M. 338.

Evans, in his edition of *Pothier*,¹ that the conversation of a person on his return home naturally connects itself with the occasion of his absence, and is an indication of the existing state of his mind; and that wherever the expressions can be so connected with the actions, as to be regarded as the mere result and consequence of the coexisting motives, they form a proper criterion for judging of the person's intention and conduct. It would be too much to infer, however, from the above decision, that the declarations of a bankrupt, made at any time afterwards, can be admitted as evidence to explain an antecedent absence, or any other past transaction which is completely finished, and without any connecting circumstances between the absence and the declaration, such statements concerning past transactions being in general wholly inadmissible, as they form no part of the *res gestæ*. And if there is any *uncertainty of the time* when a declaration of this kind is made, it cannot then be received in evidence; as where a deposition stated that the bankrupt had absented himself, and had admitted that he had done so for the purpose of avoiding his creditors—but specified *no time* when such admission was made,—it was held not even *primæ facie* evidence of the act of bankruptcy.² In one case, where the declaration was made a *few days after* the alleged act of bankruptcy, Lord C. J. Abbott held that it was inadmissible.³ But in a subsequent case such a declaration was held admissible, although made a month after the act of bankruptcy. As where a trader, being pressed for the payment of a debt, promised to give the creditor a security on the following day; instead of which he left his place of residence, and immediately afterwards gave security to another creditor, a relation; and on his return home, at the expiration of nearly a month, the attorney of the former creditor asked him what security he had given his relation, to which he replied, “he did not know;”—it was held that this declaration was admissible in evidence to support an alleged act of bankruptcy in giving the security to his relation, by way of *fraudulent preference*, and to show the conduct of the party; although it was objected that the conversation took place in the absence of the person to whom the security was given, and at too great a distance of time from the completion of the transaction.⁴

Where the act of bankruptcy insisted upon by the assign-

¹ Vol. ii. 285.

² *Marsh v. Meager*, 1 Star. 353.
³ *Lees v. Martin*, 1 Mood. & R. 219.

⁴ *Schoelling v. Lee*, 3 Star. 149.

⁴ *Ridley v. Gyde*, 9 Bing. 349.

² *Moore & S.* 448. And see *Rawson v. Haigh*, 2 Bing. 104. *Roush v. Great Western Railway*, 1 Ad. & Ell. N. S. 51.

nees is a *fraudulent grant or conveyance*, and the deed is produced in evidence, the execution must be proved in the ordinary course by a subscribing witness. An admission by the defendant of the execution of the deed will not dispense with this evidence, not even if the defendant is a party to the deed;¹ for though a party may acknowledge a deed, yet he may not know every circumstance attending the execution; and the subscribing witness may be cognizant of a fact not within the knowledge or recollection of a party to the deed, but of which he is nevertheless entitled to avail himself.² And, notwithstanding the defendant at the trial should himself produce the deed in compliance with a notice, this also is held to be not a sufficient ground for dispensing with the ordinary proof,³ though such was at one time considered to be the rule;⁴ for the mere possession of an instrument by one party does not, in general, absolve the other from calling the subscribing witness. But if the defendant (in pursuance of a notice) produces a deed to which he is not only a party, but *under which he holds property, or claims any beneficial estate*, it will then not be necessary that the plaintiff should call an attesting witness to prove the execution.⁵ And upon this principle, it seems, that where a fraudulent bill of sale is given by the bankrupt to the defendant, the admission by the defendant of the execution of the deed, in his examination before the commissioners, would (in an action of trover brought by the assignees to recover the property claimed by the defendant under the deed) supersede the necessity of calling the subscribing witness.⁶ A fraudulent conveyance cannot be read to prove an act of bankruptcy, if it has not the proper stamp affixed to it.⁷

And an assignment of all the bankrupt's effects, to which the bankruptcy creditor is *in any way privy*, is not a good act of bankruptcy,⁸ though the petitioning creditor may not be one of the assignees.⁹

A voluntary conveyance of part of a trader's property to a particular creditor, not being an act of bankruptcy *per se*, it is entirely a question for the jury to say with what intention

¹ *Abbot v. Plumb*, 1 Doug. 216.² *Per Le Blanc, J.*, 4 East, 53.³ *Gordon v. Secretan*, 8 East, 548.⁴ *Rex v. Middlezoy*, 2 T. R. 43.*Bowles v. Langworthy*, 5 T. R. 366.⁵ *Pearce v. Hooper*, 3 Taunt. 62.*Orr v. Morice*, 3 B. & B. 139.⁶ *Bowles v. Langworthy*, 5 T. R. 366.⁷ *Whitwell v. Dimdale*, Peake, 168.⁸ *Tops v. Hechin*, K. B. Trin. T. 1827. 7 B. & C. 101. And see ante, 67.⁹ *Ibid.*

the instrument was executed, and whether for the purpose of giving a fraudulent preference.¹

In order to show that a grant or transfer to a creditor is really *fraudulent*, the assignees must prove, first, that it was made on the eve of bankruptcy; secondly, that it was made in contemplation of bankruptcy; and thirdly, that it was made voluntarily, and for the purpose of favouring the creditor.² Whether a *transfer of goods* is made in *contemplation of bankruptcy* is collected from various circumstances, such as the secrecy of the transaction, the unreasonable hour at which the goods are removed from the bankrupt's premises, the proximity of the transfer to the time of the bankruptcy, and many other matters which may show what was the *intent* of the bankrupt in making the transfer, and what was his knowledge of his own insolvency.³

To prove the act of bankruptcy by *lying in prison*,⁴ the detention, and the cause of the detention, must be shown. The former may be proved by producing the prison books, containing entries of the dates of the several commitments and discharges to and from the prison;⁵ but they are not evidence of the *cause* of the commitment, for the *commitment* itself is higher proof, and if in existence ought to be produced.⁶

To prove the commission of an act of bankruptcy by a trader who is a member of parliament, by his not paying or securing to a creditor a debt of 100*l.*, the creditor himself need not be called as a witness to prove the fact of his being a creditor.⁷

The assignees will not upon the trial be tied down to proof of the *specific* act of bankruptcy, upon which the fiat was founded, being at liberty to repudiate that, and rely upon any other.⁸ Some act of bankruptcy, however, must be proved to have been committed *before* the issuing of the fiat, and *after* the contracting of the petitioning creditor's debt;⁹ and if that is proved, it is immaterial how recently it was committed before the fiat issued,¹⁰—or *how many* acts of bankruptcy may have been com-

¹ *Balme v. Hutton*, 2 Y. & J. 101.

² See ante, 69, et seq.

³ See ante, Ch. xi., pt. 2, s. 6.

⁴ See ante, 75, et seq.

⁵ *Rex v. Aickles*, 1 Leach, 436.

⁶ *Salle v. Thomas*, 3 Bos. & P. 188.

⁷ *Burton v. Green*, 3 C. & P. 306.

⁸ *Read v. James*, 1 Star. 134. *Buck*, 79. *Gibson v. King*, 1 Car. & M. 458.

⁹ Ex parte *Wainman*, C. B. L. 23.

¹⁰ *Hopper v. Richmond*, 1 Star. 507.

mitted by the bankrupt.¹ But where the lord chancellor directs an issue, or an action at law,—though he will generally permit other acts of bankruptcy to be given in evidence, yet as this is considered an indulgence to the party seeking to support the commission, such party will be required to state by affidavit upon *what particular acts* of bankruptcy he relies;² and to give notice to the other party, by what evidence he intends to prove his case.³ Upon one occasion, indeed, where the commission was proved (on the trial of an issue) to have been founded on a concerted⁴ act of bankruptcy, Lord Eldon refused to direct another issue with liberty to prove other acts.⁵

If the issuing of the fiat and the act of bankruptcy happen on the same day, evidence is then admissible against the assignees to show that the fiat was issued (that is sealed) prior to the act of bankruptcy.⁶ A verdict upon an issue directed out of Chancery, to which only one of the defendants was a party, may be received against all the defendants to prove the *time* of the act of bankruptcy.⁷ If the fiat is against *several partners*, each must be proved to have committed an act of bankruptcy; for the act of one, in this respect, will not bind the rest,—though he is the only one transacting the business, and residing at the place where it is carried on.⁸

It is to be remembered, we may observe once more, that all the preceding observations as to the proof of *the petitioning creditor's debt, the trading, and the act of bankruptcy*, will only apply where the party in the action is entitled to give, and has duly given, *notice* of his intention to dispute the validity of the fiat.

And notwithstanding a party may have given notice to dispute the requisites, yet, by 5 & 6 Vict. c. 122, s. 25, in the event of the death of the witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, the deposition purporting to be sealed with the seal of the court of bankruptcy, or a copy thereof purporting to be so sealed, is declared to be in all cases receivable in evidence of the matters therein contained.

¹ 6 Geo. 4, c. 16, s. 19; and see *Bryant v. Withers*, 2 M. & S. 131. *Donovan v. Duff*, 9 East, 21. *Rex v. Bullock*, 1 Taunt. 94.

² Ex parte *Burgess*, Buck, 233.

³ Ex parte *Bogen*, *ibid.* 137.

⁴ But see now 1 & 2 Will. 4, c. 56, s. 42.

⁵ Ex parte *Prosser*, Buck, 77.

⁶ *Wydown's case*, 14 Ves. 80.

⁷ *Lowfield v. Bencroft*, Bull. N. P. 40.

⁸ *Mills v. Bennett*, 2 M. & S. 556.

The next link to be considered in the chain of evidence (though it is in practice offered as the first in order of proof at the trial) is the due issuing of the commission or fiat; and this it will be incumbent on the assignees to prove, whether the defendant gives notice or not of his intention to dispute the three preceding matters of proof. To establish this, (in the case of a commission) it will be necessary to produce the original commission under the great seal.¹ And by 6 Geo. 4, c. 16, s. 96, no *commission*, or *adjudication* of bankruptcy, or *assignment* of the personal estate of the bankrupt, or *certificate* of conformity, is receivable in evidence in any court of law or equity, unless the same respectively shall have been first entered of record at the bankrupt office. The great seal, therefore, of the kingdom, which had been before considered the most solemn mode of authenticating any instrument, became no longer sufficient evidence to verify a commission of bankrupt; but it was necessary for the commission to have a certificate indorsed thereon, purporting to be signed, either by the person appointed by the lord chancellor to enter of record matters relating to commissions of bankruptcy, or by his deputy; which certificate is, without any proof of the signature,² declared to be receivable as evidence of the commission having been so entered of record. When, however, a commission has been superseded, the writ of *supersedeas* (reciting that a commission issued on a day certain) is evidence to show that such a commission issued on that day, even against a party who is both a stranger to the writ and to the commission; for a commission of bankruptcy is considered, in law, as a proceeding to which all the world are parties.³ If it be alleged in pleading, that the commission issued "under the great seal of Great Britain," it is no variance that it is, in fact, issued under the great seal of the United Kingdom.⁴ But it is a fatal variance to allege, that the party sued the commission *out* of the high court of Chancery.⁵ The correctness of the bond given on striking the docket cannot be disputed at *nisi prius*.⁶

By the 1 & 2 Will. 4, c. 56, s. 29, a certificate of the appointment of the assignees, purporting to be under the

¹ In Buller's *Nisi Prius*, as well as most of the other books, it is added, "And the petition to the chancellor on which the commission was granted." But this does not seem to be necessary.

² 6 Geo. 4, c. 16, s. 96.

³ *Gerris v. Western Canal Company*, 5 M. & S. 76. *Ledbetter v. Salt*, 4 Bing. 623.

⁴ *Rez v. Bullock*, 1 Taunt. 71.

⁵ *Poynton v. Forster*, 3 Camp. 58.
¹ Rose, 222.

⁶ *Folks v. Scudder*, 3 C. & P. 232.

seal of the court of bankruptcy, is declared to be evidence of such appointment, without further proof. And by ss. 25 and 26, both the personal and real estate of the bankrupt are declared to vest in the assignees by virtue of their appointment, without any conveyance or assignment. Where, therefore, in an action by assignees, their title to sue is put in issue, proof of the enrolment of the fiat, and a certificate of the appointment of the assignees, under the seal of the court of bankruptcy, is now sufficient evidence that the plaintiffs are assignees.¹

Where the declaration on a bill of exchange stated that it was indorsed to the plaintiffs as the surviving assignees, it was held necessary for the plaintiffs to prove that the bill was indorsed to them, after the bankruptcy, as *surviving assignees*.²

But although a defendant may have given notice to dispute the requisites of the fiat, yet where he had written letters to one of the assignees, and to the solicitor to the fiat, deprecating proceedings against him, these were held to be *prima facie* evidence of an admission of the plaintiffs' title to sue as assignees, without the regular proof of the bankruptcy.³ But proof of the plaintiffs' acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the title of the assignment unnecessary.⁴

With respect to actions relating to the bankrupt's *freehold property*, (which, as we have already seen, did not pass by the general assignment of the commissioners,)—the title of the assignees, where it arises under the old law, is to be substantiated by producing the bargain and sale to them from the commissioners, and proving its execution in the ordinary way. But, unless the commissioners executed the power with which they were invested in the precise manner prescribed by the statute, it had no effect in passing the estate.⁵ The deed must, therefore, appear to have been enrolled in some court of record;⁶ and this must have been done within six months after the date of the deed, according to the express provision of the statute of the 27 Hen. 8, c. 16, relating to the enrolment of bargains

¹ *Scott v. Thomas*, 6 C. & P. 611.

² *Bernasconi v. D. of Argyll*, 8 C. & P. 29.

³ *Inglis v. Spence*, 5 Tyr. 8. 1 Cr. M. & R. 432.

⁴ *Giles v. Smith*, 1 Cr. M. & R. 462. 5 Tyr. 15.

⁵ *Perry v. Bowes*, Sir T. Jones, 196. *Bennet v. Gandy*, Carth. 178. *Elliott v. Dunby*, 12 Mod. 3.

⁶ 6 Geo. 4, c. 16, s. 64.

and sales.¹ The enrolment may be proved by a certificate on the bargain and sale signed by the proper officer, which will be evidence also of the *time* when it was enrolled;² for the indorsement is considered as part of the enrolment, which being a record, is, therefore, conclusive as to the time.³ And, as the enrolment of the deed thus becomes a record, the deed may likewise be proved by an *examined copy* of the enrolment, signed by the proper officer; and the *time* of the enrolment may, in like manner, be proved by an examined copy of the officer's indorsement on the enrolled deed.⁴ As to the title of the assignees, under the new law, see 1 & 2 Will. 4, c. 56, stated in the last page.

After the 6 Geo. 4, c. 16, no *stamp* was necessary to give validity to the commission, or the assignment, or indeed to any other document or conveyance relating *solely* to the estate or effects of the bankrupt.

SECTION II.

Where the Defendant is not entitled to require strict proof of the requisites to support the Commission.

In all actions brought by the assignees for any *debt or demand*, for which the bankrupt himself could have sued, if his bankruptcy had not intervened—unless the bankrupt has taken the steps before mentioned⁵ to dispute the fiat—the *Gazette* containing the advertisement of the bankruptcy is declared to be conclusive evidence that the party became a bankrupt before the date and suing forth of the fiat, and that it was sued forth on the day on which the same is stated in the *Gazette* to bear date. This enactment of the 5 & 6 Vict. c. 122, s. 24, is an extension of the provision of the 6 Geo. 4, c. 16, s. 92, which makes the depositions conclusive evidence if the bankrupt do not, within two months after the adjudication, give notice of his intention to dispute the commission.⁶ *Trover* was under 6 Geo. 4, c. 16, s. 92, held to be an action for a *demand* within the meaning of the act.⁷ So also *detinue*, notwithstanding no demand was made by the bankrupt before the bankruptcy.⁸

¹ 2 Phill. 288.

² *Kimberley v. Orpe*, 1 Doug. 56, 58.

³ *Rex* in aid of *Reed v. Hopper*, 3 Pri. 495.

⁴ See 1 Phill. 388, 499. 2 Phill. 288.

⁵ See ante, 809.

⁶ For the cases decided under this enactment, see *Earl v. Schröder*, 1 Mood. & M. 24. *Ralphs v. Dances*, 3 C. & P. 362.

⁷ *Robson v. Alexander*, 1 Moore & P. 448.

⁸ *Smith v. Woodward*, 4 C. & P. 541.

Where a party has presented a petition in bankruptcy, seeking relief and benefit under a fiat, in respect of a particular transaction, he will be restrained by an order of the court from putting in issue the validity of the fiat, in an action commenced against him by the assignees in respect of the same transaction.¹ And an action brought by the assignees, to recover back the payment of a debt made by the bankrupt to a creditor after his knowledge of an act of bankruptcy, or after the issuing of the commission—for which the *bankrupt himself* could, of course, have no right to sue—would not be such an action as would deprive the defendant of his right at any time to dispute the requisites, upon giving the requisite notice of his intention to do so.

Where part of the claim might have been recovered by the bankrupt, and part not, and the assignees rely upon the proceedings as evidence of the requisites, they must elect to go for that part which the bankrupt might have recovered.²

The term *conclusive* must be understood to apply to the several facts contained in the depositions, and not to the conclusions of law drawn by the witnesses, or by the commissioners, from those facts. For though no witness can be called upon the trial to contradict the facts deposed to,⁴ yet if the depositions, upon the face of them, are not legal proof of a petitioning creditor's debt, trading, and act of bankruptcy, they cannot be received in evidence, notwithstanding those matters have been found by the commissioners.⁵ Thus, though the deposition (of the witness to prove the act of bankruptcy) will be conclusive evidence of the time when the bankrupt did a certain act, and of the fact itself, it will not be evidence of its amounting to an act of bankruptcy. So the deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor or assignee—nor will it be necessary in either of these cases to produce the probate, or the assignment;⁶ but, whether the sum due was a debt to support a fiat,—that is an inference of law, which the court upon the trial will not be estopped from determining, by the adjudication of the commissioners. So, if a deposition

¹ Ex parte *Anderton*, Mont. & M. 177.

² *Gibson v. Oldfield*, 4 C. & P. 314.

³ Before the 6 Geo. 4, c. 16, it was held that a party could call witnesses to contradict the facts stated in the depositions. *Ellis v. Shirley*,

3 Camp. 424. *Brown v. Forrestall*, 1 Holt, 190.

⁴ See *Humphries v. Coggan*, 1 Rose, 226.

⁵ *Clarke v. Askew*, 1 Star. 458.

⁶ *Shaife v. Howard*, 2 B. & C. 560.

state that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to A. B.,—though this is evidence of such a deed as stated in the deposition,¹ yet it is not evidence that the deed itself was an act of bankruptcy.

The whole effect, indeed, of the 6 Geo. 4, c. 16, s. 92, is only to make the depositions evidence—not to admit the fact of the bankruptcy to be proved; for this must be as strictly made out by the depositions, as it would be required to be done by witnesses.² If the facts, therefore, stated in the depositions, are sufficient of themselves to sustain the bankruptcy, no further proof is necessary;³ but they may be always objected to for not proving the subject-matter to which they apply. Thus, if the deposition of the petitioning creditor state only that the debt was due to him at and *before the time of suing forth the commission*—not showing that it existed at the time of the act of the bankruptcy—this would be defective proof of the petitioning creditor's debt.⁴ So, upon a commission sued out against the drawer of a bill of exchange, if the deposition does not state presentment and notice, there will not be sufficient evidence of the debt.⁵ And again, where the deposition of the witness to prove the act of bankruptcy stated that the party absented himself on a certain day, and that he had declared to the deponent that his motive was to avoid his creditors—but *not stating the time* when this declaration of the bankrupt was made,—this was ruled not to be sufficient proof of an act of bankruptcy.⁶ And so where the deposition omitted to state that the party absented himself with an intent to delay his creditors.⁷

In every case, however, where the depositions turn out to be insufficient proof of any of the requisites to support the commission, the assignees will not be prevented from calling witnesses to establish these facts by other⁸ evidence.

The deposition of the petitioning creditor being expressly made evidence by the statute⁹ of the several matters contained in it, is admissible at the trial in proof of his debt;¹⁰ though, if he himself were called, he would not be a com-

¹ *Kay v. Stead*, 2 Star. 200.

² *Rawson v. Haigh*, 1 Carrington. 80.

³ Per Abbott, C. J., 2 B. & C. 560.

⁴ *Clarke v. Askew*, 1 Star. 458; and see *Lawton v. Robinson*, *ibid.* 456.

⁵ *Cooper v. Machin*, 1 Bing. 426.

⁶ *Marsh v. Meager*, 1 Star. 353; and see *ante*, 822.

⁷ *Toleman v. Jones*, 9 Moore, 24.

⁸ *Clarke v. Askew*, 1 Star. 458.

⁹ 6 Geo. 4, c. 16, s. 92.

¹⁰ *Biss v. Randall*, 2 Camp. 493.

petent witness to support the commission.¹ And in one of the cases before mentioned,² the deposition was holden to be evidence that the petitioning creditor was *executor* of the party with whom the bankrupt contracted the debt, though parol evidence of that fact would not otherwise have been admissible,—but the probate must have been produced.³

And see, further, as to the admissibility of the depositions generally in evidence, *post*, Section 5.

SECTION III.

Where no Notice has been given, or is not required.

Where *no notice* has been given by the other party to the action, to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, it will now be sufficient for the assignees merely to prove the fiat and their appointment,⁴ without any further proof of their title to sue as assignees. No objection, therefore, can be taken to the validity of a commission or fiat, unless the requisite notice be given.⁵ And though the proceedings are unnecessarily produced, and a perfect petitioning creditor's debt may not appear upon the face of them, the validity of the commission can, nevertheless, not be disputed.⁶ Nor, though the object of the assignees is to make the fiat operate by relation to the time of the act of bankruptcy, are they compelled to prove that the petitioning creditor's debt also existed at that time.⁷

Infant defendants, however, in a suit in equity will not be bound by not giving notice, but strict proof will be required as against them.⁸ For a fiat against an infant is absolutely void; and he is therefore not required to give notice in an action at law.⁹

A party who omits to give notice of disputing the petitioning creditor's debt, the trading, and the act of bankruptcy, admits those facts, but not the effect of the commission in point of law.¹⁰

¹ *Green v. Jones*, 2 Camp. 411.

² *Skaipe v. Howard*, ante, 829.

³ See *Doe v. Liston*, 4 Taunt. 741.

⁴ See ante, 827.

⁵ *Beran v. Lewis*, 2 G. & J. 245.

⁶ *Stokes v. Whittaker*, 1 Sim. 376.

⁷ *Macbeath v. Coates*, 4 Bing. 34.

⁷ *Norman v. Booth*, 10 B. & C. 703. Per Lord T., and Parke, J.

Contra, *Bayley*, and *Littledale*, JJ.

⁸ *Bell v. Tinney*, 4 Mad. 372.

⁹ *Belton v. Hodges*, 9 Bing. 365.

¹⁰ *Moo. & Sc.* 496.

¹⁰ Per Lord Tenterden, 1 B. & Adol. 619.

Therefore it is a sufficient answer to an action by assignees, to prove that the bankrupt is an uncertificated bankrupt under a former commission still in force, and that on that occasion his effects were duly assigned; notwithstanding no notice has been given under the 6 Geo. 4, c. 16, s. 90. But it is indispensable, in such case, to prove that *the effects were assigned* under the first commission.¹

Where a plaintiff retains the venue upon the usual undertaking to give material evidence within the county,—if, in this case, the plea and issue be such as to render such evidence irrelevant, the performance of the undertaking is dispensed with. Therefore, if the local evidence be the trading and the petitioning creditor's debt, yet if the defendant do not give notice of his intention to dispute the commission, it seems that the undertaking need not be complied with.²

But whether notice is given or not to dispute the commission, yet in all proceedings against the *bankrupt*, either criminal or civil, strict proof will be required of the requisites to support it; and the depositions in this respect will not be sufficient evidence.³ Thus, on an indictment against a bankrupt for perjury before the commissioners in passing his last examination, it has been ruled necessary to give evidence of the petitioning creditor's debt, the trading, and act of bankruptcy—although the indictment alleged, not that the defendant *was* a bankrupt, but only that the defendant *had been duly found and declared bankrupt*; for the authority of the commissioners takes its root, not in the commission, but in the *bankruptcy*; and unless the defendant really was a bankrupt, their examination of him would be unauthorized.⁴ This strictness of proof, however, does not seem to be necessary in a criminal proceeding against *third persons*; for on a similar indictment against such a person, who had been examined before the commissioners, proof of the commissioners' adjudication was held to be sufficient.⁵

¹ *Phillips v. Hopwood*, 1 B. & Adol. 619.

² *Soulby v. Lea*, 3 Taunt. 86.

³ And see post.

⁴ *Rez v. Punshon*, 3 Camp. 96.

⁵ *Rez v. Raphael*, per Abbott, J., Devon Spring Assizes, 1818. *Man. Index*, 2nd edit. 232.

SECTION IV.

Where no Proof of the Title of the Assignees is necessary.

Where the defendant is by his own act estopped from disputing the title of the assignees, they will not be bound to prove any of the preceding matters, in order to support a right of action against him. As where the defendant has *himself contracted* with the assignees, they may, in that case, recover against him without proving themselves to be such; for the promise of the defendant is then not a promise by mere implication of law, but amounts to an actual contract, in respect of which the plaintiffs will be entitled to recover *suo jure*.¹ And even in such a case, when the plaintiffs allege themselves *to be assignees* in the declaration, the proof of that fact appears to be superfluous, provided they establish a title to recover, independent of such averment.² And the same principle seems to apply to the case, where the assignees sue upon a contract made with the defendant *by the bankrupt after his bankruptcy*; for the bankrupt being incompetent to make such contract, the assignees may adopt it as their own, and treat the bankrupt as their agent.³

The regular and formal proof will be likewise dispensed with, if the defendant has, by his own admission, precluded himself from disputing the bankruptcy. Thus, in an action brought by an assignee to recover the price of some goods, which the defendant had received from the bankrupt before his bankruptcy to sell by auction, and which he had sold after the bankruptcy,—it was held, that the defendant, having described the goods in his catalogue of sale, as “*the property of Durouweray, a bankrupt*,” had estopped himself from calling the bankruptcy in question; and that this admission dispensed with the necessity of going through the different steps of proof, as in ordinary cases.⁴ For it was considered that such an admission, being an express declaration by the defendant that Durouweray was a bankrupt, amounted also to an admission that the defendant *was acting under his assignees*, whoever they might be; inasmuch as the defendant must be taken to be cognizant of the law, that the bankruptcy countermanded any authority which the bankrupt himself

¹ *Evans v. Mann*, Cowp. 569.

² *Semb. per Ashurst, J., Evans*

³ *Per Wood, B., Thomas v. Mann*, *supra*.

Riding, Wightw. 65.

⁴ *Malby v. Christie*, 1 Esp. 340.

might have previously given for the sale.¹ So, where the defendant had purchased goods of the bankrupt—and after the bankruptcy attended a meeting of the commissioners, and exhibited an account between himself and the bankrupt, claiming certain deductions—and afterwards made a part-payment to the plaintiff,—it was held that the defendant must be understood to have treated with the plaintiff as assignee; and that this was *prima facie* evidence of his being assignee, without the production of the proceedings;² for that any recognition of a person standing in a given relation to others is *prima facie* evidence (against the person who makes such recognition) that the relation exists. So, if a defendant, on being applied to by a person whom he knows to be the collector of the bankrupt's debts for the assignees, says, "*I will call and pay the money*,"—such promise has been held to be an admission of the right of the assignees, and renders it unnecessary to give the usual proofs in support of the commission.³ Evidence, however, of this description is not *conclusive*; and the defendant in such a case may show, in answer, that the plaintiff bore some other character than that of assignee, at the time of the payment or the promise. And where, in an action of trover by assignees, the defendant's attorney admitted that the party was *duly declared* bankrupt, and the defendant had given no notice to dispute, he was held to be precluded from *objecting* to any of the requisites to support the commission.⁴

So in trespass against assignees, where the defendants, after alleging that M. had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods belonging to them in their capacity of assignees, and the plaintiff replied that the goods belonged to him, and not to the defendants; it was held, that upon this issue it was not incumbent on the defendants to give formal proof of M.'s bankruptcy, and their appointment as assignees.⁵

But the mere circumstance of a creditor having *proved a debt* under the commission, is not sufficient to preclude him from disputing its validity;⁶ for, by proving a debt, the creditor at most only gives credit to the petitioning creditor

¹ Per Lord Ellenborough, 16 East, 193.

² *Dickenson v. Coward*, 1 B. & P. 677.

³ *Pope v. Monk*, 2 Car. & P., 112.

⁴ *Perring v. Tucker*, 3 Moore & P. 558.

⁵ *Jones v. Brown*, 1 Bing. N. C. 484. 1 Scott, 453.

⁶ *Rankin v. Horner*, 16 East, 191. *Stewart v. Richman*, 1 Esp. 108. *Hope v. Fletcher*, 1 Selw. Nl. Pri. 238, contra. *Walker v. Barnell*, Doug. 317.

and to the commissioners, that the former has not sued out the commission, nor the latter declared the trader a bankrupt, without proper grounds. The creditors, in general, have not the means of knowing the evidence on which the party was declared bankrupt; and it would not be reasonable that (by proving their debts) they should be put to the dilemma of being understood to have admitted, that every act necessary to support the commission really existed, when they could not judge whether such acts did or did not exist.¹ If the assignees, therefore, bring an action against a creditor who has proved, and the creditor gives notice of his intention to dispute the commission, the assignees must regularly prove the petitioning creditor's debt, the trading, and act of bankruptcy, as in ordinary cases where those facts are disputed. Lord Eldon, however, upon one occasion expressed an opinion that there was a great difference in this respect between a mere *creditor* and an *assignee* under the commission; and said, if in any proceeding before him it was put to an assignee who had proved, either to admit the commission or not, and he elected to dispute it, he should require him to do so at the expense of his proof.² And a petitioning creditor is estopped from disputing the bankruptcy by his affidavit of debt on which the commission issued.³

Where a bankrupt had applied for and obtained his discharge from custody, on the ground that his detaining creditor had proved under the commission,—it was held that he was estopped in an action against his assignees from disputing the validity of the commission; for that, having availed himself of the commission for one purpose, he could not be afterwards allowed to assert that the commission was invalid.⁴

When a defendant puts himself upon one issue in an action, he admits all the rest. Therefore, in an action of debt on bond by assignees, a plea of payment admits their title, and they need not prove themselves to be assignees.⁵

¹ *Rankin v. Horner*, 16 East, 191.
Stewart v. Richman, 1 Esp. 108.
Hope v. Fletcher, 1 Selw. Nl. Prl. 238, contra. *Walker v. Barnell*, Doug. 317.

² *Ex parte Jecks*, 1 Rose, 393.
³ *Harmer v. Davis*, 7 Taunt. 577.
Ledbetter v. Salt, 4 Bing. 623.
⁴ *Watson v. Wace*, 5 B. & C. 153.
⁵ *Corbie v. Oliver*, 1 Star. 76.

SECTION V.

As to the Admissibility of the Depositions and Proceedings under the Fiat.

Having considered the general nature of the evidence required to support the fiat, the next subject of inquiry relates to the admissibility in evidence of the depositions and the proceedings in general under the fiat; for of those relating to the petitioning creditor's debt, the trading, and the act of bankruptcy, we have already¹ sufficiently treated.

Before the 5 Geo. 2, c. 30, s. 41, the depositions of witnesses taken by commissioners of bankrupt could not be given in evidence in an action to try the question of bankruptcy—or, indeed, any other question connected with it; because in those proceedings the parties interested had not the power of cross-examining the witnesses.² That statute made a copy of the proceedings evidence in certain cases, after being entered of record;³ and a subsequent statute,⁴ it has been shown, made also the depositions and proceedings themselves evidence to prove the petitioning creditor's debt, the trading, and the act of bankruptcy, if no notice was given to dispute those matters. The 6 Geo. 4, c. 16, also, as we have already seen,⁵ extends the admissibility of the depositions for this purpose, in actions brought by the assignees for any debt or demand of the bankrupt.

By the 95th section it is likewise enacted, that the lord chancellor may from time to time appoint a proper person, who shall by himself or his deputy (to be approved of by the chancellor) enter of record all matters relating to commissions, and have the custody of the entries thereof. And by section 96, the lord chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be so entered of record; and upon the production in evidence of any instrument so directed to be recorded, and having the certificate thereon purporting to be

¹ Ante, 828, et seq.

² *Francisco v. Gilmore*, 1 Bos. & P. 177.

³ There was a strange inaccuracy in the wording of this clause of the 5 Geo. 2, which was first pointed out by Mr. Douglas in his Reports, vol. i. 258, note (1). After the clause had enacted, that copies of

the proceedings, when entered of record, "and signed and attested as hereinafter mentioned," might be given in evidence, it made no provision whatever for attesting or signing the copies so made.

⁴ 49 Geo. 3, c. 121, ss. 10, 11.

⁵ Section 92.

signed by the proper officer or his deputy, the same shall without any proof of such signature be received as evidence of such instrument having been so entered of record.¹ The lord chancellor or court of review alone have authority to order the enrolment of the proceedings;² and the application must be on petition.³ And where an action is pending, and the assignees refuse to enrol those proceedings, which before the 6 Geo. 4, c. 16, they were compellable to produce upon a *subpoena duces tecum*, their refusal will be at the peril of costs.⁴

The 6 Geo. 4, c. 16, does not apply to the enrolment of proceedings under commissions anterior to the act. Therefore, the proceedings under a commission sued out in 1822, which were not enrolled till after the repeal of the 5 Geo. 2, c. 30, were held not admissible in evidence.⁵

By 2 & 3 Will. 4, c. 114, s. 7, in the event of the death of any of the witnesses deposing to the requisites to support the fiat, the assignees and all persons claiming through or under them, or acting by or under their authority, may produce and read in evidence, in all civil proceedings, any deposition of such deceased witness relative to the petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record, pursuant to the provisions of that act, or the 6 Geo. 4, c. 16, or 1 & 2 Will. 4, c. 56. But such depositions can only be read in evidence in cases where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand, which the bankrupt might have claimed, maintained, or defended. By section 8, no fiat, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity, is receivable in evidence, unless the same is first entered of record in the court of bankruptcy. And by section 9, upon the production of any fiat, adjudication, assignment, or other proceeding in bankruptcy, purporting to be sealed with the seal of the court, or of any writing purporting to be a copy of such document, and to be so sealed, the same shall be received as evidence of such document, and of the same having been so entered of record, without any further proof.

¹ The clerk of enrolments, however, (who is the officer appointed to enter proceedings in bankruptcy of record,) is not entitled, as against the assignees, to a *lien* on the proceedings for his fees in this respect; but must deliver them up to the assignees when required. *Ex parte Sandison*, 1 Rose, 275.

² *Johnson v. Gillett*, 5 Bing. 5.

³ *Ex parte Thomas*, 3 D. & C. 292.

⁴ *Ex parte Johnstone*, Mont. & M. 82.

⁵ *Kay v. Goodwin*, 6 Bing. 576.

By section 97 it is also enacted, that in every action, suit, or issue, *office copies* of any original instrument or writing filed in the office, or officially in the possession of the lord chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively. And if the original shall be produced on the trial, the costs of producing it will not be allowed on taxation, unless it appears that the production of it was necessary.

When, therefore, any of the proceedings under the fiat have been duly entered of record, they will be evidence of all matters contained in them, of which the commissioners had authority to inquire. Thus, as we have already seen,¹ the deposition of the witness to prove the act of bankruptcy will be evidence to prove the *precise time* when the act of bankruptcy was committed; for the witness cannot tell his story before the commissioners without saying when that took place; and as he must mention the circumstance as a matter of course in his deposition, he must be taken to have spoken the truth, unless the contrary appears.² So, the deposition of the petitioning creditor, as has been already stated, will be evidence of a debt due to him in the *character* in which he claimed it. As if it appears that the debt is due to him *as executor*, it is not necessary to produce the probate to prove him such; nor, where it appears to be due to him *as assignee*, is it necessary to produce the assignment.³ So the proceedings of the commissioners, when recorded, will be conclusive evidence of a *debt proved* under the commission, as against the assignees; for where the debt has once been liquidated before the commissioners, it cannot afterwards be disputed, except on an application to the great seal.⁴

But it is only in actions or suits brought by the bankrupt's *own* assignees, that the depositions under a fiat are made evidence. Therefore, where in an action by the assignees of B., in order to prove the petitioning creditor's debt, they proved that B. was indebted to one C., and that C.'s assignees were the petitioning creditors against B.; and in order to support the commission against C., produced the proceedings under it; it was held, they were not admissible in evidence, and that the plaintiffs were bound to prove by other evidence C.'s trading, act of bankruptcy, &c.⁵

Where the statute says that the depositions shall be *conclusive evidence*, the other party in the action cannot

¹ Ante, 828.

⁴ *Brown v. Bullen*, 1 Doug. 407.

² *Janson v. Wilson*, 1 Doug. 257.

⁵ *Mushett v. Drummond*, 10 B.

³ *Skafte v. Howard*, 2 B. & C. & C. 153.

prove that the petitioning creditor's debt was fraudulently concocted.¹

But where a bill was filed against assignees, who disputed the validity of a conveyance under which the plaintiffs claimed, upon the ground that it had been executed subsequently to the act of bankruptcy—and they tendered the proceedings under the commission as evidence of this fact;—the vice-chancellor held, that to admit the proceedings in such a case—not to sustain the title of the assignees under the commission, but incidentally to invalidate the rights of strangers—would produce the grossest injustice, in affecting the interest of a party by evidence, of which, till the moment it was produced, he was in utter ignorance, and which had been taken without any opportunity of its being met either by direct or by cross-examination; and he therefore refused to admit the proceedings in evidence.² It does not appear, from the report of this case, what particular document among the proceedings was tendered to disprove the title of the plaintiff, or whether the proceedings were recorded or not; but it should seem that the deposition of the witness to prove the act of bankruptcy would, consistently with the above case of *Janson v. Wilson*, and consistently also with the construction of the present statute, have been receivable in evidence to prove the *time of the act of bankruptcy*, unless the plaintiff had given notice to dispute the commission.

But depositions of deceased witnesses taken before the commissioner, on the opening of a fiat, and subsequently enrolled by the assignees, pursuant to the 6 Geo. 4, c. 16, s. 96, are not admissible against the assignees in an action brought against them by the bankrupt, for the purpose of disputing the validity of the fiat.³

Parol evidence is admissible to prove matters deposed by a party on his examination before the commissioner, if material to the inquiry, though they are not contained in the written examination.⁴

But though the depositions and proceedings are conclusive evidence, under the 92nd section, of the facts stated in them in actions by the assignees for a *debt* of the bankrupt—yet they are not *conclusive* evidence of those facts, as against the *bankrupt* himself. For though the 90th section extends to actions generally by or against any assignee or commissioner, and declares that *no evidence* shall be required of the peti-

¹ *Young v. Timmins*, 1 Tyr. 15.

² *Whitworth v. Graham*, 2 Rose, 364.

³ *Chambers v. Bernasconi*, 1 Cr. M. & R. 347.

⁴ *Rowland v. Ashley*, 1 Ry. & M. 231.

tioning creditor's debt, the trading, or act of bankruptcy, unless the other party gives notice of his intention to dispute these matters,—yet in the event of the *bankrupt* bringing an action against the assignees or the commissioners, within the period limited by the 6 Geo. 4, c. 16, s. 92,¹ the *action* itself would, it is apprehended, in this instance, be notice of his intention to dispute the bankruptcy, and enable him to call witnesses to contradict the depositions, though he had not, in fact, given any notice to dispute the bankruptcy at the trial,² or any actual notice within the terms of the 92nd section. The depositions, indeed, as far as they relate to the validity of the commission, do not seem to be more admissible against the bankrupt in an action, than (as we have already seen³) they are in an indictment for perjury, where strict proof is required of all the requisites to support the commission. But if the depositions have been recorded pursuant to the terms of the 6 Geo. 4, c. 16, s. 96, and the witnesses to prove the facts deposed to are dead, it is conceived that the depositions would then be admissible as evidence of the facts contained in them, even against the bankrupt—leaving him still at liberty to call witnesses to contradict the depositions.

The *examination* of the bankrupt taken before the commissioner cannot be read as evidence against a third party, who had no power of cross-examining him;⁴ but is evidence against himself, even if the questions were improperly put to him with a view to the action⁵—and though he might have demurred to them, as exposing him to penalties.⁶ But parol evidence cannot be given of what he says upon such examination.⁷ So, the examination of any party, who has signed it after it was read to him, is evidence against himself,⁸ unless it is shown to have been taken under duress, or that the party was imposed upon.⁹ But the examination of a creditor before the commissioner, acknowledging to have received money from the bankrupt since the act of bankruptcy, is not evidence against him on the *account stated* with the assignees, though it is evidence of *money had and received*. For being compelled to answer questions before

¹ See ante.

² And see *Ellis v. Shirley*, 3 Camp. 434. *Jones v. Llewellyn*, 1 Meriv. 6 (a). *Mills v. Bennet*, 2 M. & S. 556. *Cooper v. Machin*, 1 Bing. 426.

³ *Rex v. Punshon*, 3 Camp. 96; ante, 832.

⁴ Ex parte *Arnsby*, 2 D. & C. 212.

⁵ *Stockfleth v. De Tastet*, 4 Camp. 18.

⁶ *Smith v. Beadnell*, 1 Camp. 30.

⁷ *Rex v. Walters*, 5 C. & P. 141.

⁸ *Hammond v. Myers*, 3 Atk. 415.

Ex parte *Turvill*, 3 D. & C. 346.

⁹ *Robson v. Alexander*, 1 Moore & P. 448.

the commissioners is not like an accounting, and being found in arrear; ¹ and it is immaterial, with respect to the question of admissibility, whether every word used by him was taken down, or only the substance of what appeared to be relevant.² If he refers, also, in his examination, to a written document, as containing a statement of facts to which he is questioned, that document may be read as part of his³ examination; but *parol* evidence is not permitted to explain it.⁴ And where a petitioning creditor sent his agent to prove the act of bankruptcy on the opening of the fiat, it was held that the deposition then made was, as against such creditor, evidence of the act of bankruptcy in an action against him by the assignees.⁵ The examination of a *third person*, however, has been held not admissible against a party to the suit; therefore Sir T. Clarke refused to allow the examination of the defendant's attorney to be read, unless he had been examined in chief⁶ in the cause. And where a creditor had taken the bankrupt's goods in execution after an act of bankruptcy, and assigned them to B.;—the creditor's examination (taken under the commission) was holden not admissible in an action by the assignees against B.⁷ For the same reason, the examination of a bankrupt,—taken, not in his own bankruptcy, but under *another commission*,—is not (in the event of his death) evidence, upon a petition in his bankruptcy to expunge the debt⁸ of a creditor. And an examination before commissioners, on an inquiry as to a debt, is not evidence on a petition to expunge the proof of a creditor, who was no party to the inquiry.⁹ So, where a defendant pleaded a set-off in an action brought against him by assignees, and tendered *his own deposition* in proof of a debt before the commissioners, as evidence of the set-off, —Lord Ellenborough refused to receive it,—saying, that the commissioners could neither be considered as having done a judicial act, nor as having represented the assignees, so as to imply that they assented to the defendant's demand; and that it would only be sufficient evidence against the assignees, if it could be shown that *they acknowledged* that the proof was¹⁰ just. There seems, indeed, an insuperable difficulty as to the admission of such evidence, according to the principles which regulate proceedings at law,—

¹ *Tucker v. Barrow*, 6 B. & C. 623. 3 Car. & P. 85. 1 M. & M. 137.

² *Milward v. Forbes*, 4 Esp. 172.

³ *Falconer v. Hanson*, 1 Camp. 171.

⁴ *Wilson v. Poulter*, 2 Str. 794.

⁵ *Gardiner v. Moulst*, 10 Ad. & E. 464.

⁶ 3 Atk. 445.

⁷ *Deady v. Harrison*, 1 Star. 60.

⁸ *Ex parte Campbell*, 2 Rose, 51.

⁹ *Ex parte Coles*, Buck, 242.

¹⁰ *Pirie v. Mennett*, 3 Camp. 279.

where a man is not permitted to substantiate a demand by his own oath.

An old witness has been allowed to refer to his deposition (made some years before) as to the proof of an act of bankruptcy, in order to refresh his memory, and thereby ascertain the date of it.¹

Those depositions only which are read in support of the party's case upon the trial, are to be considered as given in evidence; and the opposite party has no right to inspect any other deposition, for the purpose of cross-examining a witness; but he may afterwards call for the deposition of the witness, and read it in evidence, for the purpose of contradicting him.² So, as we have already seen, upon a bill filed by the assignees for a discovery, the defendants will not be permitted to look into their depositions, in order to prepare their answer.³ The proceedings are, in fact, kept for the benefit of the creditors, and there is no general right given to inspect them as public documents. Before they are received in evidence, it must be shown that they came out of the proper custody, namely, that of the solicitor to the commission; otherwise the hand-writing of one of the commissioners who took them must be proved.⁴

It is a point frequently made at *nisi prius*, whether the solicitor to the fiat is bound to produce the proceedings, when served with a *subpœna duces tecum*. Lord Kenyon is reported in one case to have said, that he was not only not bound to produce them, but that it would be criminal for him to do so;⁵ and Lord Chief Justice Abbott, in another case, held that the solicitor was not bound to produce them in a collateral action, to which neither the assignees nor the bankrupt were parties,—and where the production might tend to the detriment of the assignees.⁶ Mr. Justice Holroyd, however, ruled, that where the party requiring the production of them (though in a collateral action) had an interest in the commission, the solicitor was bound to produce them.⁷ And Lord Gifford held, that the solicitor was bound to produce the books of the bankrupt, in order that entries relating to the matter in issue, but to no other matter, might be read,—though there was, in fact, a possibility of the assignees being prejudiced by the result⁸ of the verdict. But a court of law has no jurisdiction to order books or papers to be delivered to the assignees, at the instance of the

¹ *Vaughan v. Martin*, 1 Esp. 440.

² *Black v. Thorne*, 4 Camp. 191.

³ *Stafford v. Clarke*, 1 Carring. 26.

⁴ *Boden v. Dellow*, 1 Atk. 289.

⁵ *Collinson v. Hilear*, 3 Camp. 30.

⁶ *Bateson v. Hartsink*, 4 Esp. 43.

⁷ *Laing v. Barclay*, 3 Star. 38.

⁸ *Cohen v. Templar*, 2 Star. 260.

⁹ *Hawkins v. Howard*, 1 Ryan &

M. 64.

defendants,—the lord chancellor, or, now, the court of review, being the proper authority to which an application should be made; the court of law, however, might give the defendant time to plead, until ¹ the plaintiff thought proper to produce them.

The lord chancellor, and, now, the court of review, may, indeed, order the production of the proceedings upon any occasion which they may think proper. Thus, notwithstanding a commission had been superseded, the proceedings under it were ordered, upon petition, to be produced at the hearing of a cause in the court of Chancery in Ireland, with a view to the bankrupt's examination being given in evidence; but such an order will not be granted as a matter of course.²

The declarations of a party suing as assignee made before he became such, are not admissible against him.³

The examinations of witnesses in a suit instituted against the bankrupt before his bankruptcy, are not admissible on a supplemental bill against the assignees, if the witnesses were examined *after* the bankruptcy.⁴

SECTION VI.

*Of the Competency of the Bankrupt and his Wife as Witnesses.*⁵

Before the late statute for improving the law of evidence, 6 & 7 Vict. c. 85, neither the bankrupt nor his wife were competent witnesses, in any action or proceeding, the effect of which would be to increase the fund, or support the commission. But now, by the above statute, no person offered as a witness can be excluded from giving evidence, by reason of incapacity from crime or interest, either in person or by deposition, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person, having by law or consent of parties authority to hear, receive, and examine evidence. The act, however, does not render competent any party to any suit, action, or proceeding individually named in the record, or any person in whose immediate behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such person.

¹ *Wilson v. Legge*, 7 Moore, 409.

⁴ *Hitchens v. Congreve*, Mont.

² *Ex parte Bernal*, 11 Ves. 557.

225. ⁴ Sim. 420.

³ *Fenwick v. Thornton*, 1 M. &

⁵ And see ante, 814, 821.

SECTION VII.

Of the Competency of Creditors.

There appears to have been no decision as yet as to the effect of the statute just referred to, upon the competency of creditors; or whether, in proceedings by or against the assignees, a creditor might be considered a person in whose immediate and individual behalf the proceeding was taken or resisted. Before the passing of the last-mentioned act, it was held that a creditor could not give any evidence to deprive the bankrupt of his allowance.¹ It was, indeed, held in one case, that a creditor (who had *not proved* his debt) was competent to support the commission, though not to increase the estate, —on the ground, that he had no immediate or certain benefit, and that it might be as advantageous for the creditor to be allowed to sue his debtor, as to receive a dividend under the commission.² But, as a commission of bankruptcy passed the whole of the bankrupt's estate to the assignees, and appropriated immediately to the satisfaction of his debts what could only be reached remotely and partially by the process of common law, a creditor (though he had *not proved*) was not allowed to give evidence in support of the commission, under which he *might* afterwards prove and receive a dividend.³ For it was not considered enough that the creditor had not availed himself of the commission, in order to render him competent.⁴ And Lord Ellenborough, who had formerly been of a different opinion,⁵ held afterwards, that a creditor, though he had not proved, was yet incompetent to prove an act of bankruptcy;⁶ for that the commission brought a divisible fund within his reach, and, by supporting the commission, the creditor was enlarging his means of satisfaction.

It was a question whether, if the objection was not taken before the commissioners at the time of the examination, it could be afterwards urged as an objection to the commission.⁷

¹ *Shuttleworth v. Bravo*, 1 Str. 507. *Eggleham v. Haines*, 2 Vin. 11.

² *Williams v. Stevens*, 2 Camp. 301; and see *Rex v. Bullock*, 1 Taunt. 71; where the court considered, that the commissioners might receive evidence from a creditor who had not proved.

³ *Adams v. Malkin*, 3 Camp. 543.

⁴ Per Lord Eldon, 1 Rose, 392 (note); 2 V. & B. 177.

⁵ 2 Camp. 301.

⁶ *Crooke v. Edwards*, 2 Star. 302.

⁷ Ex parte *Hills*, 1 Mont. & M. 272. *R. v. Bullock*, 1 Taunt. 78. Ex parte *Lane*, 1 Mont. & G. 81.

But a creditor was held to be a competent witness to overthrow the petitioning creditor's debt.¹

And a creditor who has sold his debt, or agreed to sell it, is competent to give evidence either in support of the commission, or to increase the fund. For, in this case, the creditor is considered merely a trustee for the purchaser, and as ceasing to have any interest in the debt.²

In one species of bankruptcy, namely, that committed by members of parliament,³ the act of bankruptcy must necessarily be proved to a certain extent by a creditor; for the party is adjudged by the statute to be a bankrupt, unless within one month after personal service of the summons he shall pay, secure, or compound for his debt to the satisfaction of his creditor, or enter into a bond prescribed by the statute; and the creditor is in ordinary cases, of course, the *only person* who can prove that the debt has not been paid, secured, or compounded for to his satisfaction. With reference to these negative circumstances, the evidence of a creditor must (as to this particular act of bankruptcy) be admitted to that extent. But the necessity which exacts this admission, also limits the extent of it; for although he must be admitted to prove what he alone can prove, yet he is not to be allowed to prove what can be established by the evidence of others. The circumstance, therefore, of a bankrupt *being* a member of parliament, and a banker, may be derived from other sources, and ought not to be left to depend upon the statement of the creditor.⁴

The petitioning creditor was not a competent witness at the trial to prove the commission regularly sued out, because he entered into a bond to the lord chancellor conditioned to establish the several facts, upon which the validity of the commission depended;⁵ but his deposition taken before the commissioners, we have seen, is admissible in certain cases as proof of his debt, though he himself cannot be called to support it. It has, however, been held at *nisi prius*, that he may be called to *defeat* the commission,⁶ or even to cut down his own debt.⁷ And it has been seen,⁸ that the de-

¹ In re *Codd*, 2 Sch. & Lef. 116. This, however, must be taken with some qualification, for it may be the interest of an execution or a mortgage creditor to upset the commission in order to confirm his own security.

² *Granger v. Furlong*, 2 Bl. 1273. *Heath v. Hall*, 4 Taunt. 326.

³ See ante, 87.

⁴ Per Lord Eldon, ex parte *Harcourt*, 2 Rose, 203.

⁵ *Green v. Jones*, 2 Camp. 411.

⁶ *Ibid.*

⁷ *Lloyd v. Stretton*, 1 Star. 40.

⁸ Ante, 816.

clarations and admissions of the petitioning creditor have been received in evidence, for the purpose of showing the insufficiency of the debt,—although, in one instance,¹ the admission was made by him after the issuing of the commission. But, in all cases, the incompetence of the petitioning creditor may be removed, by releasing his debt to the assignees,—though the action is brought by the bankrupt to dispute the commission;² and a release to the assignees alone is sufficient for this purpose, without a release to the bankrupt.

A party ordered to attend as a witness, though he alleges that he is a creditor, and therefore incompetent, ought nevertheless not to absent himself on this ground; for the result of his examination may establish that he is not a creditor.³

A commissioner has been permitted to be examined as a witness in support of the commission, on the ground that he could not be compelled to refund the fees which he had received.⁴ He has still, however, an interest in the future fees, which he might get, if the commission were supported, *valeat quantum*.

An assignee, who has released his individual claims on the estate, is an admissible witness to prove the petitioning creditor's debt; for he is then a mere trustee, whose trust is coupled with no personal interest.⁵

¹ *Dowden v. Fowler*, 4 Camp. 38; but see *Harmer v. Davis*, 1 Moore, 300.

² In re *Gooldie*, 2 Rose, 330.

⁴ *Crooke v. Edwards*, 2 Star. 302.

⁵ *Tomlinson v. Wilkes*, 2 Brod. &

³ *Koopes v. Chapman, Peake*, 19. B. 397. 5 Moore, 173.

CHAPTER XX.

OF ANNULLING A FIAT.

SECT. 1. *Of Applications to Annul by the Bankrupt.*

2. *Of the like by other Persons.*

3. *Of the Effect of Annulling.*

4. *Of the Writ of Procedendo.*

For the Practice upon Petitions to Annul, see post, "*Practice on Petition.*"

For the *Costs* relating to Annulling, see post, Chapter on "*Costs.*"

And see also "*Joint Fiats,*" ante, 136.

SECTION I.

Of Applications to Annul by the Bankrupt.

When a fiat is improperly issued, or fraudulently obtained, or ought no longer to be proceeded in, the court of review will, on the petition of the bankrupt or any other party concerned, accompanied by a proper statement of the facts on affidavit, order the fiat to be annulled. But a bankrupt will not be permitted to try the validity of the fiat, by actions against his debtors.¹ The order for annulling the fiat, though pronounced by the court of review, is, in fact, the order of the lord chancellor; for, by the 1 & 2 Will. 4, c. 56, s. 19, the lord chancellor is empowered, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order any fiat to be rescinded or annulled; which order is declared to have all the force and effect of a writ of *supersedeas*. The usual course that has been pursued when the bankruptcy is disputed is, to order a feigned issue

¹ *Loundes v. Cornford*, 1 Rose, ley in Exchequer, Buck, 273, 180. 18 Ves. 299. *Harlow v. Crow-* contra.

to try the bankruptcy at law.¹ The court of review has, indeed, the power given it by the 1 & 2 Will. 4, c. 56, s. 4, to direct any such issue to be tried before one of its own judges, in the same manner as before any of the superior courts at Westminster; but this power has, for some reason or other, been rarely exercised, although the court was declared by that statute to be a *court of law*, as well as a court of equity. Where the commission appears plainly to have been taken out fraudulently and vexatiously, it will at once be annulled, without an issue.²

Where a bankrupt brings an action against the petitioning creditor, and at the same time petitions to supersede, he must elect which remedy he will pursue.³ A bankrupt is not prevented by the 17th section of the 1 & 2 Will. 4, c. 56, from applying to supersede, although two months have elapsed from the date of the adjudication;⁴ nor, where he admits all the requisites, is he precluded by the 24th section of the 5 & 6 Vict. c. 122, from disputing the validity of the fiat upon other grounds, although twenty-one days have elapsed, after the advertisement of the bankruptcy in the *Gazette*, before he presented his petition.⁵

The power of annulling appears to be entirely discretionary, except in one instance,⁶—namely, where nine-tenths in number and value of the creditors agree to accept a composition from the bankrupt in satisfaction of their debts—in which case the lord chancellor is expressly *directed* to supersede the commission.⁷ But, in all other cases, the same authority which enables him to issue a fiat, gives him a discretionary power to recall it—possessing in this instance the same control over a fiat, as other courts are used to exercise over their own writs and process; and, indeed, he generally does act in analogy to the proceedings of the other courts in this respect.⁸

¹ Ex parte *Wilson*. Ex parte *Bradshaw*, 1 Atk. 217.

² Ex parte *Smith*, 1 Rose, 147.
Ex parte *Emery*, 2 Rose, 234; and see ante, 142.

³ Ex parte *Drake*, 2 D. & C. 91.

⁴ Ex parte *Palmer*, 1 D. & C. 341. Mont. 497.

⁵ Ex parte *Phipps*, 3 M. D. & D. 488.

⁶ 6 Geo. 4, c. 16, ss. 133, 134.

⁷ There was also only one case specified in the former statutes, in

which the lord chancellor was *positively directed* to supersede a commission—and that was, where the petitioning creditor had *privately* compounded with the bankrupt, (5 Geo. 2, c. 30, s. 24; and see ex parte *Paxton*, 15 Ves. 461; ex parte *Freeman*, 1 Rose, 380;) but the new statute (section 8,) omits the word "*privately*," and gives the chancellor a *discretionary* power in this respect.

⁸ Ex parte *Freeman*, 1 Rose, 380.

In some cases, where the justice of the case requires it, a fiat will be annulled, though it may be unimpeachable on strictly legal grounds.¹ And, although the requisites to sustain a fiat may appear on the proceedings to be established, yet if the court be satisfied on affidavit of their insufficiency, it will annul the fiat without an issue.²

After the petitioning creditor, however, has presented a petition to annul, a petition by the bankrupt will not lie.³

There are various causes for annulling a fiat, for which the party against whom it is issued, or indeed any other party concerned, may *ex debito justitiæ* apply by petition. It is proposed, however, in the first place, to consider those cases where the bankrupt is entitled to apply to have the fiat annulled.

In the first place, if the fiat is not opened until a long period after it issues,—that has been always held a good ground for annulling it.⁴ And by a general order of Lord Loughborough,⁵ if a town commission is not prosecuted by the expiration of fourteen days after its date, or a country commission at the end of twenty-eight days, each is liable to be superseded; but one day further must elapse in both cases, before the order to annul can issue. A fiat liable to be annulled under this order for want of prosecution, cannot be annulled by the bankrupt without a petition.⁶

If the bankrupt is an *infant*⁷ when the fiat issues, or if all the trading took place during infancy,⁸ he may apply to have it annulled. So, if it be taken out against a *feme covert*, it is liable to be annulled, though upon a trading prior to her marriage.⁹ But when it appeared that the bankrupt had held himself forth to the world as an adult and *sui juris*, and had traded in that character for two years, contracting debts to a considerable amount,—Lord Eldon dismissed his petition to supersede the commission, and left him to his action at law;¹⁰ and the same rule will apply to a *feme covert* living apart from her husband, and holding herself out to the world as a *feme sole*.¹¹

¹ Ex parte *Dufrene*, 1 Rose, 333.
² V. & B. 51.

³ Ex parte *Gallimore*, 2 Rose, 234.

⁴ Ex parte *Sylvester*, Mont. 125.

⁵ Ex parte *Puleston*, 2 P. Wms. 545.
⁶ Ex parte *Fletcher*, 1 Rose, 454.

⁷ 26th June, 1793. For the construction of this order, see ante, 127.

⁸ Ex parte *Gale*, 1 G. & J. 43.

⁹ Ex parte *Barwis*, 6 Ves. 601.

¹⁰ Ex parte *Sydebotham*, 1 Atk. 146.

¹¹ Ex parte *Hehir*, 3 D. & C. 107.

¹² Ex parte *Moule*, 14 Ves. 603.

¹³ Ex parte *Mear*, 2 Bro. 265.

¹⁴ Ex parte *Watson*, 16 Ves. 265.

¹⁵ Ibid.

A fiat will also be annulled, if the bankrupt is *not a trader* when the fiat issues. And he is not precluded from applying to annul the fiat on this ground—though he has even obtained his certificate under it—if, upon the trial of an action by the assignees against a creditor, their title is thus successfully resisted, and the fiat becomes inoperative.¹ Neither will he be precluded from such an application, by having stated in a petition to enlarge the time for his surrender, that he has been *duly declared a bankrupt*.² But, although there is no evidence of trading on the proceedings, the fiat will not be annulled, if the bankrupt admitted to the petitioning creditor that he was a trader.³ But when an application of this nature is delayed by the bankrupt for a considerable time, when it might have been made earlier, the petition will in that case be dismissed.⁴ And when a bankrupt brings an action to try the validity of a fiat, he cannot at the same time proceed with a petition to annul it on the same grounds.⁵

A fiat will also be annulled, if the bankrupt when it issued had *not committed an act of bankruptcy*; ⁶ or if he had not committed one within a long period before the issuing of it.⁷ But when the bankrupt applies to annul the fiat on *this ground alone*, the court will only suspend the insertion of the advertisement declaring the bankruptcy in the *Gazette*, and will receive an affidavit of *other acts* of bankruptcy; for, upon a trial at law, the fiat may be supported upon the proof of any other act, though different from that in the adjudication. If the additional affidavit, however, is not satisfactory, the fiat will then be annulled with costs.⁸ But the court will not suspend the advertisement, unless upon the proceedings there appears a clear defect in the requisites to support the fiat.⁹ But on a petition to annul before adjudication, the commissioners will not be stopped from proceeding to inquire, whether the party has become bankrupt or not—merely on *his own* allegation, that he has not committed an act of bankruptcy, or is not indebted to the petitioning creditor to the requisite¹⁰ amount;—but if, in

¹ Ex parte *Bass*, 4 Mad. 270. But see ex parte *Lewis*, 2 G. & J. 208, contra.

² Ex parte *Jones*, 11 Ves. 409.

³ Ex parte *Bailey*, 2 M. & A. 86.

⁴ Ex parte *Moule*, supra. Ex parte *Kirk*, 15 Ves. 464. *Flower v. Herbert*, 2 Ves. 326. Ex parte *Abell*, 1 G. & J. 199. And see ex parte *Leigh*, 2 G. & J. 332.

⁵ Ex parte *Burgess*, Jacob, 559.

⁶ Ex parte *Forster*, 1 Rose, 49. Ex parte *Prodon*, ibid. 259.

⁷ Ex parte *Bowen*, 4 Ves. 168.

⁸ Ex parte *Burgess*, Buck, 233.

⁹ Ex parte *Ainsworth*, 2 G. & J. 89.

¹⁰ Ex parte *Stokes*, 7 Ves. 405. Ex parte *Lingood*, 1 Atk. 246. Ex parte *Hague*, 1 Rose, 150.

addition to either of these circumstances, the bankrupt swears that he is solvent, and offers to bring the petitioning creditor's debt into court, the chancellor will then restrain the publication of the bankruptcy in the *Gazette*.¹

So, if the petitioning creditor receives his debt, or more in the pound than the other creditors, it was held that the commission might be superseded;² though it was subsequently decided, that where the petitioning creditor after the act of bankruptcy (but *before the commission* issued) received a sum of money from the bankrupt, which reduced the debt below 100*l.*,—that was not a sufficient ground for superseding the commission; for that the payment could not be retained by him against the assignees, and the suing out the commission amounted of itself to a disaffirmance of the payment.³ And payment of money by the bankrupt to the petitioning creditor *after the suing out* of the commission, though it rendered the commission supersedable, did not render it *ipso facto* void.⁴ It was decided, also, that the *bankrupt himself* could not supersede a commission, on the ground of having given the petitioning creditor a security for his debt in preference to the other creditors.⁵

The commission might also be superseded, if the *petitioning creditor* was an *infant* when it issued; for he was obliged to enter into a bond to the lord chancellor upon striking the docket, and he could not, as an infant, bind himself by bond.⁶ And the like where the petitioning creditor was a *feme covert*, though the debt might be due to her in *autre droit* as executrix.⁷ And where there are several petitioning creditors—each being required to give a bond—this objection will equally apply.⁸ So, if the petitioning creditor has not a *legal debt* to the amount specified in the⁹ statute—or if the debt accrued *subsequent to any act* of bankruptcy committed by the¹⁰ bankrupt—or is barred by the statute of limitations¹¹—or if

¹ *Ex parte Fletcher*, 1 Rose, 336.

² *See quare*, whether the bankrupt himself can for this cause petition to supersede the commission. See *ex parte Kirk*, *infra*.

³ *Ex parte Miller*, Buck, 283.

⁴ *Garrett v. Biddulph*, 4 Esp. 104.

⁵ *Ex parte Kirk*, 15 Ves. 464. This case was decided with reference to the 5 Geo. 2, c. 30, s. 24; but see now 6 Geo. 4, c. 16, s. 8, by which the lord chancellor has a discretionary power in such a case, either to supersede the commission, or to order it to be proceeded in.

⁶ *Ex parte Barrow*, 3 Ves. 554.

⁷ *Ex parte Morton*, Buck, 42.

⁸ *Ex parte Mogg*, 2 G. & J. 397.

⁹ *Ibid*.

¹⁰ *Ex parte Hylliard*, 1 Atk. 146. *Burnaby's case*, 1 Str. 653. *Medlicott's case*, 2 Str. 899. *Ex parte Mackerness*, 1 P. Wms. 259.

¹¹ 6 Geo. 4, c. 16, s. 19.

¹² *Quantock v. England*, 2 Bl. 702. *Horsey's case*, Mosely's Rep. 37. *Ex parte Dowdney*, 15 Ves. 493. *Ex parte Raffey*, 2 Rose, 245.

the petitioning creditor had the bankrupt in execution at the time of issuing the commission,¹—or is a party to a deed of assignment of the bankrupt for the benefit of his creditors, which he sets up as an act of bankruptcy²—the bankrupt, in each of these cases, may apply to annul the fiat. But a mere formal defect in the affidavit of the petitioning creditor is not a sufficient ground for superseding the commission—as where the affidavit was for goods sold and delivered, when (at the time of making it) he had previously entered up judgment in an action brought for the goods; for it is sufficient, if the creditor swears to the truth and reality of the debt.³ And whenever the petitioning creditor's debt is found insufficient to support the commission, the lord chancellor is empowered by 6 Geo. 4, c. 16, s. 18, upon the application of any other creditor who has proved a debt sufficient to support a commission, (provided the same has been incurred not anterior to the petitioning creditor's debt,) to order the commission to be proceeded in, notwithstanding the insufficiency of the petitioning creditor's debt.

When a fiat is *fraudulently* or *vexatiously* issued,⁴ it will in every such case be annulled; and the court will in addition punish the parties concerned, by committing them to prison, and ordering them to pay the costs.⁵ And where there was nothing done under a commission, and the petitioning creditor is not to be found,—this was held to be such a case of fraud, as would render the commission⁶ supersedeable. So also, though the commission were legally valid, yet if it had been taken out against good faith, or with a view to enforce a compliance with an arrangement pending between the parties,—the lord chancellor would supersede it, upon the general principle which all courts adopt to control the abuse of their own process.⁷ Where the fraudulent purpose could be defeated without superseding the commission, and there was no objection to it on any other ground, the vice-chancellor declined to interfere by granting⁸ a *supersedeas*; but Lord Eldon, upon appeal, in a luminous judgment, reversed this order, saying, that when

¹ *Burnaby's case*, supra. *Cohen v. Cunningham*, 8 T. R. 123.

² *Ex parte Bunn*, 3 Deac. 119.

³ *In re Bryant*, 1 Rose, 288. 1 V. & B. 211.

⁴ *Ex parte Wilson*, 1 Atk. 218. *Ex parte Conway*, 13 Ves. 62. *Ex parte Haywood*, *ibid.* 67. *Ex parte Arrowsmith*, 14 Ves. 209.

⁵ *Ex parte Thorpe*, 1 Ves. 394.

⁶ *Ex parte Hartop*, 9 Ves. 109. 12 Ves. 349.

⁷ *Ex parte Harcourt*, 2 Rose, 203.

⁸ *Ex parte Bourne*, 1 G. & J. 311.

a commission was so taken out, the court would determine at once that it should not stand.¹

If a fiat is sued out for an express purpose, *foreign from its proper object*, or under a false colour for a concealed object,—such as to determine a lease²—or to work a dissolution of partnership³—or to put an end to an action at law commenced by the bankrupt⁴—it will be annulled at the costs of those who sue it out. And the same, where the object of issuing it is even meritorious—as when it is taken out for the purpose of facilitating a composition with the creditors; for, though in many instances the result might be beneficial, yet as such a practice (Lord Eldon said) might lead to much mischief, the court would always discountenance it.⁵ It is no ground, however, for annulling a fiat, that it was sued out with intent to defeat a previous execution, or an undue preference, if no collusion appear on the part of the bankrupt.⁶ And though the petitioning creditor may have really *other objects* in view than the mere distribution of the estate,—as thinking it a prudent thing to get rid of a bad partner,—the court has refused on *that account alone* to supersede the commission, where it plainly appeared that he was not influenced by any fraudulent motives.⁷

A *country commission* was also supersedable, which did not include the names of two barristers, according to the terms of Lord Loughborough's order⁸—or when the order was evaded, by carrying the commission to be executed at a distant town, when it might with as much propriety have been executed at another town, near which two barristers resided.⁹ But when a barrister did not reside so near, as to be able to attend without his travelling expenses being paid, that was an excuse for dispensing with the order.¹⁰ And in one instance a country commission was refused to be superseded, where the ground of the application was, that it was issued to a place where there were only two creditors, and which was distant 200 miles from the great body of the creditors;—though

¹ 2 G. & J. 137.

² Ex parte *Gallimore*, 2 Rose, 424. Ex parte *Christie*, 2 D. & C. 488.

³ Ex parte *Browne*, 1 Rose, 151. Ex parte *Phipps*, 3 M. D. & D. 505.

⁴ In re *Bourne*, 2 G. & J. 137, where there is a very elaborate judgment of Lord Eldon upon this subject, reversing a previous order of the vice-chancellor. And see ex parte *Saunders*, 2 D. & C. 488.

⁵ Ex parte *Bourne*, 16 Ves. 150.

⁶ *Menham v. Edmonson*, 1 Bos. & P. 369. Ex parte *Bowes*, 11 Ves. 541. Ex parte *Arrowsmith*, 14 Ves. 209. Ex parte *Gardner*, 1 Rose, 377. 1 Ves. & B. 45.

⁷ Ex parte *Wilbean*, Buck, 459. 5 Mad. 1.

⁸ 12th August, 1800.

⁹ Ex parte *Harbin*, 1 Rose, 58.

¹⁰ *Ibid.*

the court, in this case, thought it was but just to enlarge the time for the choice of assignees.¹ A country commission was likewise supersedable at the costs of the petitioning creditor, when the name of any commissioner was inserted, who was a creditor of the bankrupt,—and this even on an *ex parte* application.² If notice of the adjudication is not given at the bankrupt office at some period of the twenty-ninth day after the issuing of a country fiat, the practice is uniform to annul it as a matter of course on the thirtieth day, upon an application made for that purpose on the twenty-ninth. In one case, even where the adjudication did not take place until the twenty-eighth day—and, by the course of the post from the place where the commission was executed, it was impossible that such notice could reach London by the twenty-ninth,—the lord chancellor refused to supersede a second commission, which had been taken out under these circumstances by another creditor.³

Where a docket was struck on the 22nd of September, upon which a fiat was issued on the 25th, but was not opened until the 11th of October; and in the mean time the bankrupt received several debts due to him, and on the 29th of September filed his petition under the Insolvent Act, 5 & 6 Vict. c. 116, and obtained an interim order of protection, on an allegation that his debts did not amount to 300*l.*; the court refused to annul the fiat, either on the ground of the delay in opening it, or for the purpose of giving effect to the proceeding in insolvency.⁴

Two fiats cannot subsist together for the same purpose—the *second* is (strictly speaking) void,⁵ and will in general be superseded. But special circumstances, as *fraud* or *laches* in the petitioning creditor under the first commission—or an acquiescence of the other creditors for a considerable time after the issuing of the second commission,—will be a ground for supporting the last fiat, and for *annulling the first*.⁶ And the court will always exercise a discretion on the subject, and support that fiat which is most convenient, by annulling the other.⁷ Thus, where a period

¹ *Ex parte Fellows*, 2 Mad. 141.

² *Ex parte Story*, Buck, 70. *Ex parte Mathews*, 1 G. & J. 164; and see Lord Eldon's General Order, July 25th, 1817, and *ex parte Prosser*, 2 Rose, 370. *Ex parte Crundwell*, 2 Mad. 292.

³ *Ex parte Henderson*, 2 Rose, 190. *Ex parte Getting*, 2 M. D. & M. 498; but see *ex parte Soppit*, Buck, 81.

⁴ *Ex parte Whipple*, 3 M. D. & D. 449.

⁵ *Ex parte Buller*, 1 Rose, 136; and see ante, Ch. v., a. 4. *Ex parte Webster*, 2 G. & J. 252.

⁶ *Ex parte Brown*, 2 Ves. jun. 67. *Ex parte Proudfoot*, 1 Atk. 253.

⁷ *Ex parte Layton*, 6 Ves. 434. *Ex parte Hardwicke*, *ibid.* *Ex parte Lees*, 16 Ves. 472. *Ex parte Massey*, 19 Ves. 539.

of fifteen years had elapsed since a first commission issued, during which the bankrupt was permitted to carry on trade,—a petition to supersede the second commission by the petitioning creditor under the first (who was the bankrupt's father-in-law, and must have had some knowledge of the bankrupt's transactions during all that period) was dismissed with costs,—Lord Eldon saying, that if the first commission had been kept on foot fifteen years, with the view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, he would rather supersede *that* commission, at the instance of the assignees under the *second*, than the *second* at the instance of the assignees under the *first*.¹ So, where the petitioning creditor was prevented from prosecuting a *first* commission by the artifices of a person, who was desirous of covering certain transactions between himself and the bankrupt, by the lapse of two months after it had issued,—the lord chancellor directed a writ of *procedendo* to issue for the prosecution of that commission, notwithstanding it had in fact been superseded, and two other commissions subsequently sued out.² So, also, where the parties under the *first* commission place themselves by contract in a different situation from what they were in when the first commission issued, the first will be superseded, and the second supported.³ And cases have occurred, where, upon a bankrupt under a subsisting old commission applying to supersede a new one, the lord chancellor has refused to interpose—if the persons claiming beneficially under the old commission did not mean to interfere with the effects under the new one; though, at the same time, this will not prevent the first commission from being set up as a bar to an action under the second.⁴ The bankrupt, however, will be justified in applying to annul a second fiat, where a creditor (who might have proved under the first) is the petitioning creditor under the second—or where it is taken out under circumstances making it not expedient that it should remain ostensibly in force, whilst void in law. But, if the bankrupt applies to have it annulled, on the principle, that all the property is vested in the assignees under the first commission,—the court may order him to bring all his property into court, that the equities between the two classes of creditors may be settled.⁵

¹ Ex parte *Lees*, 16 Ves. 472.

⁴ Ex parte *Rhodes*, 15 Ves. 543.

² Ex parte *Knight*, 2 Rose, 319.

Ex parte *Craw*, 16 Ves. 236. Ex parte *Irvine*, 1 Mad. 74.

³ Ex parte *Bullen*, 1 Rose, 136.

⁵ Ex parte *Lees*, 16 Ves. 474.

It is no ground for annulling a joint fiat against two partners in this country, that a prior separate commission against one of them is existing in Ireland.¹

Where a *third* commission issued against a bankrupt, who had not paid 15s. in the pound under the second, it was superseded, on the ground that, by 6 Geo. 4, c. 16, s. 127, the third commission was void at law, and that all his future property is declared to vest in the assignees under the second commission.²

Another cause for superseding a fiat is, as we have before seen, when *separate* and *joint* fiats are issued against the different members of a partnership;—in which case the court will, for the convenience of administering the *joint effects*, in general, annul the *separate* fiat, and establish the joint one.³

The lord chancellor has refused to stay the progress of a commission, upon a *mere offer* to pay into the name of the accountant-general a fund alleged to be sufficient for the payment of the creditors.⁴ And where the bankrupt proposed that a freehold estate (of which he was possessed, and which he alleged was more than adequate to the payment of his debts,) should be sold, and the proceeds applied to that purpose,—Lord Eldon thought he could not interfere, without being perfectly satisfied that the proposal would be fully and speedily effectuated.⁵

But if *all* the creditors (who have proved debts under the commission) agree to have it superseded, the bankrupt may, in this case, petition to annul;⁶ the consent, however, of the creditors must be certified by the commissioners; and this proceeding will not be dispensed with, though all the creditors have even received 20s. in the pound, and though some of them reside abroad.⁷ But where all consent, and the bankrupt has paid 20s. in the pound, it is no objection to the annulling of the fiat, that the bankrupt's last examination has been adjourned *sine die*, though it seems that the cause of such adjournment should be satisfactorily explained.⁸ When, however, two creditors (who had been, as well as all the others, paid their debts in full,) could not be found, but their

¹ Ex parte Cridland, 2 Rose, 164. 3 V. & B. 94.

² Ex parte Lane, Mont. 12; Fowler v. Coster, 10 B. & C. 427; but see Butler v. Hobson, 5 Scott, 821, and ante; see also ex parte Baker, 1 Rose, 452. Ex parte Hodgkinson, 2 Rose, 173. Ex parte Buckle, 1 G. & J. 32.

³ And see ante, 138.

⁴ Ex parte Kemp, 2 Rose, 5, note (a).

⁵ Ex parte Bryant, 2 Rose, 5.

⁶ Ex parte Jones, 8 Ves. 328.

⁷ Ex parte Jackson, 8 Ves. 533. Ex parte Milner, 19 Ves. 204; and see 1 Atk. 135, 244. Ex parte Croker, 3 D. & C. 9.

⁸ Ex parte Gudge, 4 D. & C. 358.

securities had been delivered up with receipts upon them, and their signatures satisfactorily proved,—the lord chancellor thought this was ground sufficient for superseding the commission.¹ And where all the commissioners but one was dead, and one of the creditors was also dead, intestate without being administered to, but whose son was ready to consent, Lord Eldon directed that the surviving commissioner might certify, and that the son of the deceased creditor might sign a consent to the *supersedeas*.² In one case, where the bankrupt was abroad, the lord chancellor allowed the surrender to be dispensed with, and permitted the bankrupt's solicitors to sign the petition.³ And in another case, where one of the creditors could not be found, an order was made for the *supersedeas*, on the bankrupt undertaking to pay into court the amount of the debt of the petitioning creditor.⁴ Any secret preference of a creditor, by the bankrupt giving him money or security to induce him to give his consent, will be considered fraudulent as against the other creditors;⁵ therefore, when the bankrupt confessed a judgment to a creditor, in consideration of his not opposing the bankrupt's petition for a *supersedeas*,—the court of Common Pleas set it aside, even on the application of the bankrupt.⁶ By a general order of Lord Eldon,⁷ no commission could be superseded on the ground of the consent of all the creditors, until after the second meeting;⁸ and the commissioners are directed at that meeting to adjourn the choice of assignees, if they are satisfied that such a petition will be presented.

Under this head of *consent of creditors* may be classed the provision in the 6 Geo. 4, c. 16, as to what is termed the *composition contract*, which is taken from the Scotch sequestration act,—and which, having been frequently acted upon with advantage in that country, it has been thought advisable to engraft on the English bankrupt law. By 6 Geo. 4, c. 16, s. 133, it is provided, that if at any meeting of creditors after the bankrupt shall have passed his last examination (whereof and of the purport whereof twenty-one days' notice shall have been given in the *Gazette*) the bankrupt, or his friends shall

¹ Ex parte King, 2 Ves. 40.

⁶ Thomas v. Rhodes, 5 Taunt.

² Ex parte Wallis, 2 G. & J. 478.

³ Ex parte Carling, 2 G. & J.

⁷ 21st August, 1818, Buck, 281.

^{35.} Ex parte Crowther, 4 D. & C.

⁴ Ex parte Crowther, 4 D. & C.

^{31.} Ex parte Crowther, 4 D. & C.

⁶ Ex parte Ridley, Mont. 131.

⁸ The practice before was to supersede it at any time after the first meeting. Ex parte Duckworth,

16 Ves. 416. Ex parte Law, 4 Mad.

273.

make an offer of composition, or security for such composition, which *nine-tenths* in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall thereupon be appointed, whereof a similar notice shall be given; and if at such *second* meeting *nine-tenths* in number and value of the creditors then present shall also agree to accept such offer, the lord chancellor shall and may, upon such acceptance being testified by them in writing, supersede the commission. By section 134, any creditor, whose debt is below 20*l.*, is not to be reckoned in *number*, but the debt is only to be computed in *value*. Any creditor (to the amount of 50*l.*) residing out of England must be personally served with a copy of the notice of the meeting so long before, as that he may have time to come and vote at it; and he is entitled to vote by letter of attorney, executed and attested in the manner required for creditors voting in the choice of assignees. If any creditor agrees to accept any gratuity, or higher composition, for assenting to such offer on the part of the bankrupt, he is liable to forfeit the debt due to him, together with such gratuity or composition. And the bankrupt must (if required) make oath before the commissioners, that there has been no such transaction between him (or any other person with his privity) and any of the creditors, and that he has not used any undue means or influence with any of them, to obtain their assent to the offer of composition.

As no provision is made in the act with respect to the manner of holding these two meetings, or in which evidence is to be given of the performance of the several particulars contained in the above sections, the following directions have been established, by a general order of Lord Eldon.¹ At the first meeting a minute must be taken by the solicitor of the assignees, of the names of the several creditors present, and of the amount of their several debts standing in proof upon the proceedings—distinguishing such of them as shall assent to the above composition. The second meeting is required to be held at a meeting of the commissioners, who are directed, by deposition of witnesses and documentary evidence, as to them shall appear to be proper, to inquire and ascertain whether the requisites of the act previous to such meeting have been duly performed, and to certify the same to the lord chancellor, together with the proceedings which have taken place at such second meeting.

¹ 27th June, 1826.

For the better information, also, of all parties interested, the commissioners are ordered to state in their certificate, what proportion in number and value the creditors assenting to the composition bear to the creditors who have proved debts to the amount of 20*l.* and upwards, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.¹

When questions on this new enactment of the composition contract may come before our courts for decision, they will, probably, be guided in some measure by the determinations of the Scotch tribunals, which have already taken frequent cognizance of its different provisions. These are all collected in Mr. Bell's Commentaries on the Laws of Scotland,² but though useful to refer to in a case of difficulty, cannot be given as a precise authority to the English lawyer. It seems that the Scotch courts hold, that an offer to the creditors of a sum in gross (or what they quaintly term a *slump sum*) is not a composition within the meaning of the above provision—deeming it necessary that each creditor shall be offered a rateable proportion of his debt; but after this offer has been made, any additional composition of so much per pound, though payable on a contingency, is allowed to be tacked to it. The *security* offered by the bankrupt or his friends, they likewise hold, must extend to the *whole composition*;—and, therefore, a composition of 5*s.* in the pound, with security only for 4*s.*, and the bankrupt's own bill for the remainder, has been decided to be a bad offer. The creditor's assent to the composition at the first meeting is, also, held not binding upon him at the second; the *first* meeting being considered (as indeed plainly appears from the above enactment) to be intended only for receiving the proposal of the bankrupt, or his friends—and the *second* to be the one for finally deciding on it. Nor is a creditor bound by the composition, so as to be barred from suing for his debt, unless he is present at the meetings, or agrees to take the composition, or has proved under the commission.

For all that is enacted by the above section is, that, when a certain proportion of the creditors agree to take a composition, the chancellor may supersede. It does not at all interfere with the rights or securities of persons not parties to the agreement.³ On a petition by the bankrupt to annul under the above section, the assignees must be served with the

¹ And see *ex parte Clarke*, 3 M. D. & D. 595.

² Vol. ii. p. 484.

³ *Tuck v. Tooke*, 9 B. & C. 437.

petition.¹ And the application cannot be made until after the second meeting.²

It is a general rule, that the bankrupt cannot petition to annul the fiat before he has surrendered to it; notwithstanding the time for surrender has not expired,³ and the application is made with the consent of creditors.⁴ And in the case of a joint fiat, every one of the bankrupts must have surrendered;⁵ therefore, he cannot apply to annul before any meeting has been held under the commission.⁶ And if the time for his surrender has expired, he must first apply by petition for leave to surrender, before he can petition to annul.⁷ In one case, indeed, it was thought necessary to issue a renewed commission for the mere purpose of enabling the bankrupt to surrender previous to superseding.⁸ This rule, however, has been sometimes dispensed with, where there was no intention in the bankrupt to defraud his creditors by not appearing within the time appointed, and when his absence proceeded from ignorance of the consequence, or from accident—or where he was out of the country, and never heard of the issuing of the commission.⁹ And, indeed, it was the custom with Lord Macclesfield, when the bankrupt's omission to surrender arose from any of these causes, to supersede the commission on that account alone, in order to prevent a prosecution against him for felony.¹⁰ In one case, too, after the adjudication, Lord Eldon (upon being satisfied that there was not a sufficient act of bankruptcy) superseded the commission at the costs of the petitioning creditor, although the bankrupt had not previously surrendered.¹¹ And in another case the vice-chancellor, upon a petition presented by the bankrupt *within the forty-two days*, superseded the commission without a previous surrender of the bankrupt, on the ground of the insufficiency of the petitioning creditor's debt, saying that the bankrupt was not bound to surrender till the last public meeting.¹² So that it

¹ Ex parte Race, 2 M. & A. 242.

² Ex parte Boardman, 4 D. & C. 724.

³ Ex parte Drake, Mont. 486.
² Deac. & C. 91.

⁴ Ex parte Levi, 2 M. & A. 685.

⁵ Ex parte Knowlson, 3 D. & C. 191.

⁶ Ex parte Stokes, 7 Ves. 405.
Ex parte Jones, 11 Ves. 409. Ex parte Wilkinson, 1 G. & J. 387. Ex parte Bean, 17 Ves. 47.

⁷ Ex parte Jones, 8 Ves. 328.
Ex parte Kirkman, 3 D. & C. 450.

⁸ Ex parte Galpin, Mont. 207.

⁹ Per Lord Hardwicke, ex parte Wood, 1 Atk. 222. Ex parte Lavender, 1 Rose, 55. Ex parte Hopkins, *ibid.* 228. Ex parte Carling, 2 G. & J. 35.

¹⁰ 1 Atk. 222.

¹¹ Ex parte Foster, 1 Rose, 49; and see ex parte Preston, *ibid.* 259.

¹² Ex parte Nichols, 2 G. & J. 101.

would seem from this case, where the bankrupt petitions adversely to his creditors before the expiration of the time for surrender, he may be heard without having surrendered.¹ And where the application is made by the petitioning creditor—and it appears that the bankrupt was out of the country, and had not heard of the fiat—and all the creditors (who have proved) subscribe their names to the petition—and the assignees also testify their consent;—it seems, then, a matter of course to annul the fiat without any surrender of the bankrupt.² But though all the creditors consent, yet if the bankrupt is not abroad, and does not apply to annul until *after the forty-second day*, he cannot obtain his order without a previous surrender.³ If, however, he has been prevented by illness from surrendering, then the court will dispense with the surrender.⁴ If the bankrupt dies before the last meeting of the commissioners, and is thus by the act of God prevented from surrendering, the court will then, upon the petition of his personal representative, make the same order as if he had surrendered.⁵ But where the bankrupt had died abroad *after the third meeting* without surrendering, it was determined, that a petition by his representative to supersede a commission could not be heard, unless it made out a case that would induce the court to permit a surrender if the bankrupt were living.⁶

Where a bankrupt petitions to annul, the court cannot compel him to undertake not to bring an action;⁷ but where an action is pending which involves the same question as that on the petition, the court may, in that case, call upon him

¹ And see *ex parte Peaker*, 2 G. & J. 339.

² *Ex parte Hopkins*, 1 Rose, 228.

³ *Ex parte Peaker*, 2 G. & J. 337.

⁴ *Ex parte Norcott*, Mont. 281.

⁵ *Ex parte Whittington*, Buck, 235.

⁶ *Ex parte Crowther*, Buck, 480. With respect to the above rule of practice, that a party shall not be allowed to apply to supersede a commission without a previous surrender to the commissioners, it undoubtedly seems rather inconsistent that he should thus be required, in a certain degree, to submit to the very authority which he insists to be invalid—and the validity of which, also, without any such sur-

render, it is competent for him to contest (as the law at present stands) either in a civil action, or a criminal prosecution. (See *ex parte Roberts*, 1 Mad. 72.) Sir W. Evans recommends a middle course of proceeding, namely, to give the party an opportunity of submitting the question in each particular case to the consideration of the court, upon a particular motion; and that the surrender should be dispensed with, whenever the opposition to the commission appears to arise from a fair and real objection to its validity, and not from any vexatious or improper motive.—See Letter to Romilly, s. xxvi.

⁷ *Ex parte Daly*, 3 D. & C. 728. *Ex parte Pownall*, Id. 723.

to elect whether he will proceed with the petition, or the action.¹

A bankrupt, who is *attainted* of felony, cannot be heard by petition to annul the fiat, whether his attainder arose out of the fiat, or is wholly irrelevant to it;² for a person *attainted* can be heard only in a court of justice, for the direct purpose of reversing the attainder, and not in the prosecution of a civil right.³ But a bankrupt, in custody under a commitment by the commissioners for prevarication, is not thereby *absolutely incapacitated* from petitioning to annul⁴—especially when all his creditors consent to the fiat being annulled;⁵ though, in one instance of this kind, Lord Eldon refused to supersede the commission, even with the consent of the creditors—considering that the bankrupt, by not answering to the satisfaction of the commissioners, was guilty of a great offence.⁶ Where the bankrupt was under terms (by a judge's order) not to proceed in a petition then pending to supersede a commission, Lord Eldon said that he would not hold a man precluded, by an order of that kind, from applying to the great seal on a subject within its peculiar jurisdiction.⁷

If the bankrupt has acquiesced in the validity of the fiat, he cannot apply to annul it.⁸ But his having applied for his protection, and having agreed with the assignees to purchase his estates, have been held to be acts not amounting to an acquiescence.⁹ But the execution of a deed by the bankrupt, reciting the commission and the proceedings under it, has been held to be an acquiescence.¹⁰

By the 5 & 6 Vict. c. 122, s. 24, if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe) within three months after such advertisement,—or (if elsewhere) within twelve months, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have presented the same with due diligence and with effect, the *Gazette* containing the advertisement is declared to be conclusive evidence in all cases as against the

¹ *Ex parte Daly*, 3 D. & C. 728.
Ex parte Pownall, Id. 723.

² *Reaz v. Bullock*, 1 Taunt. 82.

³ *Ibid.* 14 Ves. 452.

⁴ *Ex parte Maginnis*, 1 Rose, 60.
18 Ves. 289.

⁵ *Ex parte Browne*, 2 Swanst.
290.

⁶ *Ex parte Bean*, 17 Ves. 47.
1 Rose, 211.

⁷ *Ex parte Dick*, 1 Rose, 51.

⁸ *Ex parte Davy*, 1 M. & A. 297.
4 D. & C. 322.

⁹ *Ex parte Hill*, Mont. 9.

¹⁰ *Ex parte Hall*, Mont. 354.

bankrupt, and in all actions at law or suits in equity, brought by the assignees for any debt or demand, for which the bankrupt might have sustained any action or suit had he not been adjudged bankrupt; that he became a bankrupt before the date and suing forth of the fiat, and that the fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date. And it has been decided that the words "in all cases," include petitions by the bankrupt to annul the fiat.¹

It is no ground for the bankrupt's application to annul a fiat, that he is described in it by a different name, if that was the name which he had himself adopted and used; for the law will not permit a man to say that he is not known by a name, which he has himself held forth to the world as his² right one. And where there is only one commission issued, and the name is *idem sonans*, a variance in the spelling does not seem to be material.³ Nor will a commission be superseded on account of a misdescription of the bankrupt, if he is well known by the description⁴ in the commission; nor if he be described, as he described himself in carrying on his trade, and according to the popular description of his residence, notwithstanding it is not the legal description.⁵ But a commission wholly omitting to describe the bankrupt of the place, where he had chiefly been known as a trader, is bad, though his last place of trading be correctly described;⁶ nor where a *feme covert* trader by the custom of London was by mistake described as a *widow*.⁷ But where the bankrupts were described as "of Sun Wharf, London and Wolverhampton"—and it appeared they had no residence or establishment whatever at Wolverhampton,—the commission was in this case superseded.⁸ But "L. H. M., of Finsbury-square, in the city of London"—instead of the "county of Middlesex,"—is not a material misdescription.⁹ And see further as to the *description* of the bankrupt, ante, 124, et seq.

A tender made to the petitioning creditor of the proving of his debt, after a docket had been already struck against the bankrupt, although before the fiat was actually issued, is not a sufficient ground to annul the fiat.¹⁰ Nor will the court annul a fiat on the bankrupt's petition, though consented to

¹ Ex parte *Thorold*, 3 M. D. & D. 285.

² Ex parte *Smith*, 2 Rose, 25.

³ Re *Baldwin*, 2 Rose, 20; and see post.

⁴ Ex parte *Horsley*, 2 Mad. 11. Ex parte *Richards*, 2 M. D. & D. 493.

⁵ Ex parte *Wride*, 2 G. & J. 99.

⁶ Ex parte *Parrey*, 2 G. & J. 225.

Ex parte *Beadles*, 2 G. & J. 243.

⁷ Ex parte *Carrington*, 1 Atk. 206.

⁸ Ex parte *Beckwith*, 1 G. & J. 20.

⁹ Ex parte *Smith*, 1 G. & J. 256.

¹⁰ Ex parte *Jones*, 3 D. & C. 697.

by the petitioning creditor, on the ground that the bankrupt had made an arrangement for the payment of his debt, without being satisfied that there were no other creditors, or, if there were any such, that they consented to the application.¹

Although there may be a strong probability that the person (against whom a fiat is sued out) is not a proper object for a commission, yet if the depositions establish the bankruptcy, such probability merely will not be a ground for the court's interference to stop the progress of the fiat.²

SECTION II.

Of Applications to Annul by other Persons.

The fiat may also be annulled (for any of the causes specified in the previous section) upon the petition of other parties, as well as on the petition of the bankrupt. And if the *petitioning creditor* has not prosecuted the fiat so far as to give an interest in it to others, he may apply, as a matter of course, to have it annulled, unless the bankrupt should oppose it.³ But where a petitioning creditor having heard and believed that the party against whom the fiat had issued was a married woman, the court would not for this cause, on his petition, order the fiat to be annulled, but merely suspended the prosecution of it.⁴ A petitioning creditor cannot annul a fiat without first applying to the court; and where he did so in one case, upon receiving his debt from the bankrupt, he was ordered to refund the money which he had so received.⁵ A fiat of bankrupt is, in fact, an execution for *all creditors*; and the petitioning creditor, therefore, cannot receive his debt and annul the fiat, while the other creditors are ⁶ unsatisfied. Where, too, a petitioning creditor applies to annul a fiat, which is taken out with a different object from that which the law recognizes as the proper object of a fiat,—the court will annul the fiat, without prejudice to the bankrupt's right of action, but will not give any direction for the petitioning creditor to issue another.⁷ Where two commissions issued against a man, the first by a wrong name (though one he was in the habit of using)—and the second by his right name,—

¹ *Ex parte Parr*, 1 Deac. 77.

² *In re Lewis*, 2 Rose, 59.

³ *Ex parte Prowse*, 1 G. & J. 92.

Ex parte Palmer, Mont. & M. 211; and see post.

⁴ *Ex parte Harland*, 1 Deac. 75.

⁵ *Ex parte Thomson*, 1 Ves. 157.

⁶ *Ex parte Stokes*, 7 Ves. 408.

⁷ *Ex parte Smith*, 1 Rose, 333.

upon an application by the petitioning creditor under the second commission, the first was ordered to be superseded; for where there is a commission against a bankrupt by his *right name*, that ought to stand in preference to the other.¹ A petition by the petitioning creditor to annul a fiat (before it has been opened) ought to be served upon the bankrupt.² And where a petitioning creditor applies to have the fiat annulled, because he is unable to prove an act of bankruptcy, he must file an affidavit that the fiat was issued *bonâ fide*, and that the application is made without any compromise with the bankrupt.³

So any other creditor of the bankrupt may, in an early stage of the proceedings, and for good cause shown to the court, apply by petition to annul the fiat, notwithstanding he has proved his debt.⁴ But a creditor has no absolute right to have the fiat annulled, even although the adjudication may have been reversed, the annulling of the fiat being a matter resting entirely in the discretion of the court; and a creditor who, without sufficient reason, delays applying till two years after the fiat, comes too late.⁵ And although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of illegality, cannot petition to annul it.⁶ The petition of the creditor must contain an allegation, that the petitioner is a creditor, or it will not be heard.⁷ And where the affidavit (in support of the petition) stating that the petitioner is a creditor, is contradicted by the examination of the bankrupt before the commissioners,—an inquiry will be directed, as to whether the petitioner was a creditor, so as to entitle him to petition.⁸ It seems that a creditor, who is proceeding against the bankrupt at law, must consent to discontinue the action, if he applies to annul the fiat; for if he will not do so, he has nothing to do with the fiat, nor any resource to the great seal.⁹ Any tampering of a creditor with the bankrupt, or any breach of faith¹⁰ of the creditor, will cause the petition to be dismissed with costs.¹¹ But

¹ Ex parte *Schofield*, 2 Rose, 246; and see *Stevens v. Elizée*, 3 Camp. 256.

² Anon. 1 G. & J. 23. Ex parte *Barker*, Buck, 493. Ex parte *Forth*, 1 Mont. & M. 10.

³ Re *Catchpol*, 2 Dea. 98.

⁴ 2 Rose, 33. Ex parte *Bonser*, *ibid.* 61. 2 Rose, 62. In 2 Mad. 281, it is reported to have been held, that a creditor, who has not proved, cannot petition to supersede a commission. Sed quære.

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⁵ Ex parte *Clarke*, 2 D. & C. 194. Ex parte *Maxwell*, 3 M. D. & D. 713.

⁶ Ex parte *Jarman*, 4 D. & C. 393.

⁷ Ex parte *Oxley*, 1 G. & J. 12.

⁸ Ex parte *Fowles*, Buck, 98. Ex parte *Bold*, 1 Cox, 423. Ex parte *Hudson*, 2 Russ. 456.

⁹ Ex parte *Joseph*, 1 Rose, 189. Ex parte *Hardenbergh*, *ibid.* 206.

¹⁰ Ex parte *Muckhouse*, 3 D. & C. 25.

¹¹ Ex parte *Baker*, 2 D. & C. 362.

when a creditor, honestly believing a fiat to be invalid, does not prove under it—but (acting adversely) declares to the bankrupt and his friends, that he means to petition to annul the fiat, unless his debt is paid,—this is not such a tampering as will bar his petition.¹ After the bankrupt, however, has obtained his certificate, the fiat will not be annulled, unless the invalidity of it appears on the face of the proceedings,² or the petition accounts satisfactorily for the delay,³ or unless a case of fraud is made out against the bankrupt, and the fraud must be alleged in the petition, it is not enough to state it in the affidavit.⁴ And if he has conducted himself honestly, the fiat will not be annulled at the instance of the creditors after certificate—although there is an objection to the trading, the petitioning creditor's debt, or the act of bankruptcy—and though debtors to the estate upon that ground refuse to pay the assignees.⁵ If the court makes any order upon such a petition, it will be to direct an issue to try the bankruptcy; for after the bankrupt has got his certificate, a creditor can have no action at law against him—as the certificate (unless it has been obtained by fraud, or is void under the statute) is a conclusive bar against him—that of itself being evidence of the trading, act of bankruptcy, &c. And where a commission was proceeded upon in the usual manner, and all the creditors had acquiesced in it, and the whole was completely finished,—Lord Hardwicke refused to supersede it on a petition of the creditors—which suggested that an action had been brought by the assignees to recover some part of the bankrupt's property—and that, a witness having stated that an act of bankruptcy was committed before the petitioning creditor's debt accrued, (which, under the former law, rendered a commission invalid,) the assignees submitted to a nonsuit;—for such submission of the assignees was held to be not a sufficient determination of the bankruptcy;—and the act of bankruptcy, also, (stated to be proved by the witness at the trial) was considered in this case to be somewhat of a doubtful nature.⁶

If it is clear that the petitioning creditor has no *bona fide* intention of proceeding with the fiat, the court will then order it to be annulled, without regard to the expiration of the fourteen days under the general order.⁷ And in all cases of fraud, the fiat will be annulled as a matter of course—as

¹ Ex parte *Paterson*, 1 Rose, 402.

² Ex parte *Levi*, Buck, 75.

³ Ex parte *Gregory*, 3 M. D. & D. 572.

⁴ Ex parte *Wyatt*, 3 D. & C.

665.

⁵ Ex parte *Crowder*, 2 Rose, 324; and see ex parte *Moule*, 14 Ves. 602.

⁶ Ex parte *Desautels*, 1 Atk. 145; but see ex parte *Bass*, 4 Mad. 270.

⁷ Re *Levy*, Mont. & M. 11.

where there is a fraudulent misdescription of the bankrupt for the purpose of misleading creditors,¹ as where the bankrupt carried on business in the *town* of Carnarvon, and he was described as of some obscure village in the county of Carnarvon, where he merely resided, and did not carry on any business.² And in all cases of fraud the court will annul a fiat without regard to any lapse of time, and although the bankrupt has obtained his certificate.³ But when a misdescription is so slight that no creditor is deceived by it, the court will not then annul the fiat, on the petition of a creditor who has no intention to issue another fiat.⁴

So any party, who can show that he sustains a grievance from a fiat, may petition to annul it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust deed, which the fiat would overreach, may petition for this purpose.⁵

One of the most usual grounds for the application on the part of the creditors is, any preference shown by the bankrupt to the petitioning creditor. Thus, where the petitioning creditor, though with the knowledge of two or three other creditors, received his debt from the bankrupt after the issuing of the commission,—the commission was superseded, even on the petition of a creditor privy to the transaction.⁶ But it is doubtful whether that creditor would have been permitted to sue out a fresh commission.⁷ So, where the commission appeared to be clearly the commission of the bankrupt and not of the creditor, and the bankrupt had evidently the management and direction of it—the lord chancellor was accustomed to supersede it.⁸ But a trader may now, as we have before seen,⁹ by making a private declaration of his insolvency at the bankrupt office, commit a valid act of bankruptcy to support a commission against him; and the 7th section expressly declares, that no commission founded on this act of bankruptcy shall be deemed invalid, by reason of such a declaration being concerted or agreed upon between the bankrupt and any of his creditors. And by 1 & 2 Will. 4, c. 56, s. 42, no fiat can be annulled, nor any adjudication reversed,

¹ Ex parte *Shadbolt*, Mont. 89.
Ex parte *Dart*, 2 D. & C. 543. Ex
parte *Poole*, 2 Cox, 227.

² Ex parte *Morris*, 1 Deac. 498.

³ Ex parte *Moule*, 14 Ves. 602.
Ex parte *Cutten*, Buck, 68.

⁴ Ex parte *Mills*, 3 D. & C. 888.

⁵ Ex parte *Jones*, 3 D. & C. 697.

⁶ Ex parte *Brine*, Buck, 19; and
see ante.

⁷ Ex parte *Smith*, 1 Rose, 333.

⁸ Ex parte *Staff*, Buck, 431. Ex
parte *Prosser*, *ibid.* 77. Ex parte
Grant, 1 G. & J. 17. Ex parte
Gouthwaite, 1 Rose, 87. Ex parte
Edmonson, 7 Ves. 303. Ex parte
Binner, 1 Mad. 250, &c.

⁹ Ante, 87.

by reason only that the fiat or adjudication has been concerted between the petitioning creditor and the bankrupt. So by the 5 & 6 Vict. c. 122, s. 8, no fiat is to be deemed invalid by reason of the act of bankruptcy being concerted or agreed upon between the bankrupt and any creditor, or other person.

Another cause for annulling the fiat at the instance of a creditor, is, where there has been an unreasonable delay in the prosecution of it by the petitioning creditor—as where the adjudication is not made until nine months after the fiat issued—notwithstanding the delay may be occasioned by the acts of the bankrupt, and may also be with the concurrence of most of the creditors. For the *public*, as well as the bankrupt and his creditors, are interested in the due prosecution of a fiat; as, until the bankruptcy is declared, the bankrupt is in the situation of a person, with whom all the world ostensibly, and yet nobody in reality, can deal.¹ And a fiat which is not proceeded in after it has issued within the time limited by the general order² may (as we have before seen)³ be superseded by any creditor, except the petitioning creditor, as a matter of course, by a mere application at the⁴ bankrupt office.

The *assignees* may, also, apply to annul a fiat, even for defects appearing on the proceedings; but such an application will be watched with great jealousy, as it is their duty, in the first place, to do all in their power to clear any doubts as to the validity of the fiat.⁵ And they should not join with a creditor who has an interest adverse to the fiat, on a petition to annul.⁶ So much, indeed, is it considered incumbent on them to support the fiat, under which they derive their trust, that the court will refuse to indemnify them against the consequences of a *supersedeas*, at whosesoever instance the same may be issued.⁷

And where assignees had brought an action, in which they were not able to prove a sufficient trading to support the commission, and had also done other acts under the commission, and then presented a petition to have it superseded, and that all costs and expenses might be paid by the petitioning creditor; it was held that the application came too late, and that they were themselves liable for the costs which had been incurred.⁸

¹ Ex parte *Luke*, 1 G. & J. 361.
Ex parte *Best*, Mont. & M. 63.

² Lord Loughborough, 26th June, 1793.

³ Ante, 127.

⁴ Ex parte *Gale*, 1 G. & J. 41.

⁵ Ex parte *Graves*, 1 G. & J. 86.

⁶ Ex parte *Wilks*, 2 M. & A.

672.

⁷ In re *Bryant*, 2 Rose, 17.

⁸ Ex parte *Paul*, Mont. & M.

185.

A third commission against a bankrupt, who had not paid 15*s.* in the pound under the second, was held to be supersedeable on the petition of a person who had been summoned to attend the commission as a witness.¹

Where the bankrupt died after the petition was presented it was ordered to stand over until his personal representatives were served.²

If the sole assignee be a creditor and sign the consent to the fiat being annulled, he need not be served with the petition.³ And on a petition to supersede by consent of creditors, the official assignee need not sign the petition.⁴

SECTION III.

Of the Effect of Annulling.

A commission was not actually superseded by merely obtaining an order for a *supersedeas*, it being necessary that the writ itself should be issued to supersede it effectually. Therefore, where an order for superseding a commission was obtained under a general order for want of prosecution, but the commission was opened, and the bankruptcy adjudged before the writ of *supersedeas* was sealed,—the commission was under these circumstances supported.⁵

And even the writ of *supersedeas*, though the great seal had been affixed to it, was inoperative while it remained in the hands of the lord chancellor; but a delivery of it to the messenger, although it was not taken out of the bankrupt office, was a delivery to the party.⁶

By superseding a commission—every thing which had been done under it was considered (under the former law) to become void, whilst the writ of *supersedeas* remained in force—without any limitation as to the period of time that might intervene between the issuing of the commission and of the *supersedeas*. Therefore, where a bankrupt (after his creditors had released him, and given him his certificate) petitioned to supersede a commission, and for liberty to collect the debts still due to the estate,—Lord Hardwicke said that it was imprudently prayed to supersede the commission, since that

¹ Ex parte *Lane*, Mont. 12.

² Ex parte *Leworthy*, Mont. 54.

³ Ex parte *Ramsay*, 1 M. & A. 708.

⁴ Ex parte *Parker*, 3 D. & C. 112.

⁵ Ex parte *Leicester*, 6 Ves. 429.

Ex parte *Layton*, *ibid.* 434. Ex parte

Hardwicke, *ibid.* *Poynton v. Foster*,

3 Camp. 58.

⁶ Ex parte *Freeman*, 1 Rose,

380.

would entirely defeat the certificate; and he therefore made a special order, enabling the bankrupt merely to collect the debts.¹ Before the 6 Geo. 4, c. 16, the title also of purchasers under the commission was in like manner entirely defeated by the *supersedeas*,²—the effect of which was considered to divest the estates previously conveyed to the assignees by the assignment and bargain and sale; for which reason the lord chancellor, as has been before observed, frequently refused to supersede a commission (and this even upon the consent of all the creditors) where *bonâ fide* purchasers were in possession of any part of the bankrupt's property—unless the bankrupt chose to confirm the purchases under which they claimed.³ And for the same reason, where a first commission was superseded in favour of a second commission, it was always the practice of the court to call upon the assignees under the *second* commission to confirm any sale made by the former assignees.⁴

This indiscriminate and general effect of the *supersedeas* was restrained by section 87 of 6 Geo. 4, c. 16, according to which no title to any real or personal estate sold under any commission, or under any order in bankruptcy, can be impeached *by the bankrupt, or any person claiming under him*,⁵ in respect of any defect in the suing out of the commission, or in any of the proceedings under the same,—unless the bankrupt shall have commenced proceedings to supersede the commission, and duly prosecuted the same *within twelve calendar months* from the issuing thereof. And by section 94, if the commission be superseded, all persons from whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are discharged from all demands by the bankrupt—as well as all persons who shall without action or suit *bonâ fide* deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them;—provided no notice to try the validity of the commission has been given by the bankrupt, and been proceeded in, within the time and in manner

¹ Ex parte *Leaverland*, 1 Atk. 145.

² Ex parte *Jackson*, 8 Ves. 533.

³ Ex parte *Milner*, 19 Ves. 204; and see ex parte *Edwards*, 10 Ves. 104. *Twoood v. Hankey*, Buck, 67.

⁴ Ex parte *Smith*, Buck, 262, in note.

⁵ This section merely protects a purchaser against any claim of the

bankrupt, or persons claiming under him as purchasers, devisees, heirs, or personal representatives, and does not protect a purchaser against the assignees under a second commission; for assignees do not claim, in strictness, under the bankrupt, but adversely to him, and by operation of law. *Gould v. Shoyer*, 6 Bing. 738.

required by the act. And in a recent case¹ it has been held, that neither a *supersedeas* nor an order to annul has any retrospective effect, so as to invalidate acts done under the commission or fiat. By 6 Geo. 4, c. 16, s. 16, a fiat against several partners may now be annulled against one partner without affecting its validity as to the others.²

Where a commission is superseded, after a creditor (at whose suit the bankrupt is detained in custody) has proved under the commission—in consequence of which the bankrupt has been discharged,—the creditor, we have seen in a former chapter,³ may proceed in the action as if he had not proved his debt. Accordingly, where a bankrupt was discharged from an execution, which was pending against him at the time of the proof of the execution creditor, and the commission was afterwards superseded, on the ground of its being fraudulently issued to defeat the plaintiff's claim,—it was held that the bankrupt might be retaken under the execution.⁴

The jurisdiction in bankruptcy, it has been also observed,⁵ is not determined by the superseding of the commission, as far as respects all acts which have been done under it *before* it was superseded.⁶ The court of review has, therefore, even *after* the fiat is annulled, a discretionary power still to grant relief to any person who has been injured by its operation during the period of its existence. And it also retains its power over the proceedings, which it sometimes orders to be deposited in the bankrupt office for safe custody.⁷ Indeed, from the tenor of the writ of *supersedeas*, it would seem that its effect was in reality not absolutely to *vacate* the commission, but merely to render it *dormant*; ⁸ for it commands the commissioners only “to stay and surcease all further proceedings upon the commission,”—without directing the commission itself to be *quashed* or *cancelled*.

Where a commission had been superseded on the ground of there not being a valid petitioning creditor's debt, and a fresh commission had been issued, and the same assignees chosen,

¹ *Smallcombe v. Olivier*, 2 Dow. & L. 217.

² See ante. Ex parte *Bygram*, 2 G. & J. 391. Re *Coleman*, 1 Mont. & M. 15.

³ Chap. ix. sect. 2.

⁴ *Baker v. Ridgway*, 2 Bing. 42. This could not formerly be done. See ante, 201, note (5). *Jaques v. Withy*, 1 T. R. 567. *Turner v. Hayne*, 7 T. R. 430. *Vigers v.*

Aldrick, 4 Burr. 2482. *Blackburn v. Stupart*, 2 East, 243.

⁵ Ante, 15.

⁶ Ex parte *Bernal*, 11 Ves. 558. Ex parte *Warren*, 1 Rose, 276. 19 Ves. 162. Ex parte *Fector*, Buck, 428. Ex parte *Cowan*, 3 B. & A. 123.

⁷ Ex parte *Shaw*, 1 Jac. 270. 1 G. & J. 124.

⁸ Buck, 200, note (a); and see post, “*Procedendo*,” and vol. ii.

—it was determined, that they could not enforce the performance of a contract of sale of property made by them under the first commission; for, not being *then* able to prove a good petitioning creditor's debt, they could not at the period of the contract make out a valid title.¹

SECTION IV.

Of the Writ of Procedendo.

The writ of *procedendo* issues under the great seal, upon the special order of the lord chancellor; and it is granted for the purpose of ordering the commission to be proceeded in, when it has been suspended by a writ of *supersedeas* issued without sufficient cause. It operates in the same way with respect to commissioners of bankrupt, as it does with respect to commissioners of *oyer and terminer*, and justices of the peace;—whose authority, when suspended by writ of *supersedeas*, may be restored by the writ of *procedendo*.² This latter writ recites the previous writ of *supersedeas*, which (as has been already observed) does not, in strictness, render the commission absolutely void, but merely suspends its operation; though (whilst it does continue in force) it has been held to avoid all acts that have been previously done under the commission,—a consequence, however, that seems to be scarcely warranted from the language of the writ.³ The *procedendo* directs the commissioners to proceed upon the commission, and to put the same in execution, as if the same had not been superseded. The effect of the writ is, therefore, to place every thing in the same situation as if the *supersedeas* had not issued. But so much caution was observed by the court in issuing the *supersedeas*, that it is seldom necessary in practice to apply for a writ of *procedendo*. In two cases, where it appears to have been granted—the petitioning creditor was, in one, prevented from prosecuting the commission by the artifices of two persons, whose object was to delay the prosecution of the commission until after two months had expired, so as to give effect to certain transactions between them and the bankrupt, which the commission (if not superseded) would have overreached;—and Lord Eldon, under these circumstances, directed the writ of *supersedeas* to be

¹ *Bartlett v. Tuckin*, 1 Marsh, 583. 2 Rose, 436.

² Regist. 134. 12 Ass. 21. H. P. C. 162. 1 Bl. Com. 353.

³ And see ante, 871.

quashed, and a *procedendo* to issue.¹ In the other case, where the witness to prove the act of bankruptcy was kept out of the way by the bankrupt and his wife, for the purpose of avoiding the service of the summons to attend the commissioners, and the petitioning creditor was by that means prevented from prosecuting the commission to adjudication,—a writ of *procedendo* was directed by the lord chancellor to issue, after the commission had been superseded (upon the petition of the bankrupt) for want of prosecution² under the general order.

Where, before the bankruptcy court act, a commission was superseded upon the certificate of the vice-chancellor, Sir Thomas Plumer thought that he might, of his own authority, hear a petition for a writ of *procedendo* to issue, and certify the propriety of awarding such writ.³ And although the lord chancellor has, upon a fiat being ordered to be annulled by the court of review, issued his confirmatory order, yet the court of review, upon a proper case for re-hearing, can, in effect, order a *procedendo*, by means of its intimation to the lord chancellor.⁴

¹ Ex parte *Knight*, 2 Rose, 319.

⁴ Ex parte *Lavender*, 4 D. & C.

² Ex parte *Bowler*, Buck, 258. 496.

³ Ex parte *Crump*, Buck, 3.

CHAPTER XXI.

OF THE PRACTICE ON PETITION TO THE COURT OF REVIEW,
AND ON APPEAL TO THE LORD CHANCELLOR.

The proper and usual course of making any application to the court of review is by *petition*¹—except in cases of applying for a *habeas corpus*, when the proceedings *ought* to be by *motion*,² though the writ has been granted in some few instances on petition.³ An application by motion, also, has been sometimes entertained before the commission has been opened⁴—or for the amendment of the minutes of an order⁵—or for a special order as to service,⁶ but it cannot be made to adjourn a petition.⁷ It is a general rule, that a *petition* should not be presented, where relief is provided for by a *general order*—otherwise it will be dismissed with costs.⁸

A petition lies to restrain a bankrupt from proceeding at law to dispute the fiat.⁹ But the court will not interfere between two adverse claimants, one claiming as equitable mortgagee, and the other under a prior lease made by the bankrupt of the same property, when the estate of the bankrupt has no interest in the question.¹⁰

A petition may be framed in the alternative; and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances.¹¹

No statements should be made in a petition, which are inconsistent with the legitimate object of the relief it prays. For though an order might be made upon one part of it, yet

¹ In re *Walker* (before the Lords Commissioners), 2 M. & A. 270, and see note (a) to ex parte *Lucas*, 1 M. & A. 100.

² 7 Ves. 425. *Taylor's case*, 8 Ves. 328. Ex parte *Tomkinson*, 10 Ves. 106. Ex parte *Hiams*, 18 Ves. 237.

³ Ex parte *James*, 1 P. Wms. 610. Ex parte *Lingood*, 1 Atk. 240. 1 Swanst. 31. Ex parte *Hayman*, 2 G. & J. 26.

⁴ 1 Mont. Dig. 134.

⁵ *Ibid.*

⁶ Ex parte *Anderson*, Buck, 38. Ex parte *Peyton*, *ibid.* 200.

⁷ Re *Hardy*, 6 Mad. 252.

⁸ Ex parte *Watts*, 1 Rose, 436.

⁹ Ex parte *Hill*, Mont. 9.

¹⁰ Ex parte *Royals*, 3 D. & C. 294.

¹¹ Ex parte *Scholey*, Buck, 476.

where there is much groundless imputation against a party, the whole will be dismissed with costs.¹ But when a petition contained only two points, Lord Eldon did not think that he was prevented from making an order as to one, because he could not make an order as to the other.² Where the prayer of a petition was to expunge a charge of collusion made in another petition, and to be heard before that petition came on,—the last petition was dismissed with costs; for the lord chancellor said, that he could not possibly decide whether there was any foundation for the charge or not,³ without previously hearing the matter complained of in the first petition. A petition, also, to expunge the proofs that had been made by various creditors upon certain bills of exchange, was dismissed, on the ground of being multifarious. But the vice-chancellor refused to give costs to the creditors who opposed this petition; as that, he said, would be to make those creditors, whose debts were beyond dispute, contribute to the defence of doubtful debts.⁴

So, the claims of different persons cannot be united in the same petition, as where three creditors petition for an order to prove three distinct debts;⁵ but when they have one common object, as to procure a new choice of assignees, then such a petition would not be multifarious.⁶

A creditor cannot present a petition to prove, until the commissioner have rejected his proof; and the petition must also state the grounds of their rejection of it.⁷ Therefore, where a creditor, after attempting to prove 5,000*l.* before the commissioners, petitioned to prove 10,000*l.*,—the petition was dismissed.⁸

Where one of several assignees presents a petition, he must either make his co-assignees parties, or serve them with the petition.⁹ But such a petition cannot in general be supported, without assigning some reason for the others not being joined. Where, however, a petition was presented by one of four assignees, describing himself as “acting assignee,” and stating that one had become bankrupt, and left the kingdom, that another had retired from business and resided at a

¹ Ex parte *Vernon*, 13 Ves. 270.

² Ex parte *Ross*, 1 Rose, 37.

³ Ex parte *Leigh*, Buck, 132.

⁴ Ex parte *Coles*, Buck, 256.

⁵ Ex parte *Saer*, Mont. & M. 280.

⁶ Ex parte *Bouffield*, Mont. 128.

Ex parte *Howell*, Mont. 129.

⁷ Ex parte *Wilson*, 1 Cox, 808.

Ex parte *Wright*, 2 Ves. jun. 41.

Ex parte *De Tastet*, 1 V. & B. 280.

Ex parte *Curtis*, 1 Rose, 274. Ex

parte *Schmaling*, Buck, 93.

⁸ Ex parte *Fry*, 5 Mad. 132.

⁹ Ex parte *Fosbrooke*, 3 Dea. 686.

Ex parte *Brereton*, 3 M. D. & D.

614.

distant place, and that the fourth had concurred in the petition; this was held to be sufficient.¹

A petition should be properly entitled *in the bankruptcy*, or it cannot be heard; for if it is headed "*in Chancery*," no order in bankruptcy can be made upon it.² But if it is correctly entitled *in the bankruptcy*, it is not vitiated by being also entitled *in Chancery*.³ And where a petition by assignees under a joint commission to supersede a separate commission, (which had been issued against one of the bankrupts,) was entitled *in the joint commission only*, it was held bad; but the court, in such a case, will allow the petition to stand over for the purpose of amending the title.⁴

A petition for the committal of a person for publishing insulting observations on the court of review, and on parties engaged in litigation before it, with reference to proceedings on a particular bankruptcy, is properly entitled, in the matter of such a bankruptcy.⁵

By a general order of Lord Eldon's,⁶ all petitions in bankruptcy presented for hearing must, before they are presented, be respectively signed by the petitioners, except in case of partnership, or absence from the kingdom; in the former of which cases, the signature of one of the parties will be deemed sufficient; and in the latter case, the petition must be signed by the person presenting it on behalf of the person abroad. But in one case, where the parties to a petition were very numerous, the court permitted it to be heard, on its being signed by one of the parties only, and attested by his solicitor.⁷

This order will not be dispensed with, except under very special circumstances verified by affidavit.⁸ But, where the petitioners lived at York,⁹ or in Scotland,¹⁰ and their signatures could not be obtained before the petition day, the lord chancellor permitted the agents in town to sign it for them, the agents undertaking to be answerable for costs. But if a petitioner reside in Scotland, the signature of the petitioner is sufficient, and the petition need not be signed by an agent.¹¹

¹ Ex parte *Caldecott*, Mont. & M. 433.

² Ex parte *Glandfield*, 1 G. & J. 387.

³ Ex parte *Hudson*, 2 G. & J. 228.

⁴ Ex parte *Mills*, Buck, 230; and see ex parte *Beddam*, 1 Rose, 310. Ex parte *Row*, 1 Mad. 309. Ex parte *Byron*, 2 Rose, 368.

⁵ Ex parte *Turner*, 3 M. D. & D. 523.

⁶ 12th August, 1809.

⁷ Ex parte *Vines*, Mont. 516. Anon. id. 517.

⁸ Anon. 1 Rose, 99.

⁹ In re *Boldero*, 1 Rose, 231. Ex parte *Stone*, Buck, 255.

¹⁰ Re *Topley*, 3 M. D. & D. 93.

¹¹ Ex parte *Paul*, Mont. 252.

When a petition is presented by assignees, it must be *signed* by *all* who present it, and not by one only, as in the case of partners; but a petition by two assignees, on behalf of themselves and a third assignee, who had not signed the petition, was held to be regular.¹ But in a subsequent case, the court of review thought that the attestation was within the spirit of the general order, and allowed it to be amended *instantly*; ² and a partner signing in the partnership name, instead of individually for himself and partners, has been held insufficient.³ The signature, also, of each person signing as a petitioner, must be attested by the solicitor actually presenting the petition—or by some person who must state himself in his attestation to be attorney, solicitor, or agent of the party signing, in the matter of the petition.

With respect to the *attestation* of the signatures of petitions, a subsequent general order⁴ has directed, that the attestation shall be strictly according to the directions of the order above mentioned. It has been held, however, that if it appear in any part of the petition, or by the indorsement on it, that the solicitor attesting it was the solicitor actually presenting it, such attestation is sufficient; and that the solicitor need not state himself in his attestation to be solicitor in the matter of the petition.⁵ And an attestation in these terms: "I attest this to be the signature of A. C.—W. A. A., his solicitor in the matter of this petition," is a sufficient compliance with the general order.⁶ An attestation "Witness, H. G. F., his solicitor in the matter of this petition," was held insufficient, there being no manifestation that it related to the signature of the petitioner.⁷ But if the person attesting the signature of the petitioner is *not* the solicitor actually presenting the petition, he must then, pursuant to the directions of the above order, state himself in his attestation to be the attorney, solicitor, or agent of the party signing *in the matter of the petition*.⁸ And where there were two petitioners, and the attestation was, "Witness to the signature, J. Mortlock, solicitor," who was not the solicitor presenting the petition,—the vice-chancellor held the attestation in every way insufficient; as it did not even state him to be solicitor for the

¹ Ex parte *Chester*, Mont. & M. 435, note.

² Ex parte *Wiggins*, Mont. 516.
³ D. & C. 497.

⁴ Ex parte *Morgan*, Buck, 109.

⁵ 6th February, 1816.

⁶ Ex parte *Champneys*, 1 G. & J. 354, (note.)

⁷ Ex parte *Caldecott*, 1 Mont. & M. 433.

⁸ Ex parte *Cracklow*, Mont. 353.

⁹ Ex parte *Wilkinson*, 1 G. & J. 353. Ex parte *Cox*. Ex parte *Thomason*. Ex parte *Thomas*, *ibid.* 355, n. (a.)

petitioners. And where the attestation was even "T. H., *solicitor to the petitioners*," it was held to be insufficient.¹ When a petition, presented by a party resident in Scotland, is properly attested by a solicitor, the petitioner will not be called upon to give security for costs;² nor specify whether he was witness to the signature of both or of which of the two petitioners.³

An attestation by the *agent* to the petitioner's *solicitor* is not in conformity with the terms of the order, which requires the attestation to be by the *petitioner's* solicitor or agent,⁴ though, in one case, where the petition was attested by the agent of the solicitor, and afterwards authenticated by the solicitor, it seems that such attestation was held sufficient.⁵ And where the solicitor had not actually witnessed the signature of the petitioner, which purported to be "*authenticated*," not "*attested*," by the solicitor,—who put his name to it from a knowledge of the petitioner's hand-writing,—the lord chancellor thought, in this case, that the spirit of the order had been complied with; as its object was to have the pledge and responsibility of a solicitor of the court to the propriety of the application.⁶ But in a similar case before the vice-chancellor, he thought that *authentication* was not equivalent to *attestation*; and that the intention of Lord Eldon, in the last case, was to relieve against the mistake in that particular instance, and not to establish a general rule by his decision.⁷ And, in a subsequent case, his honour still retained the same opinion.⁸

A mere omission as to the description of the solicitor in the attestation of the petition, may (as well as a mistake in the title) be amended upon an application to the indulgence of the court for that purpose, the petitioner undertaking to pay the costs of the day; but if the mistake is incapable of being rectified, the petition will be dismissed with costs.⁹ Where the prayer of a petition is amended, the petitioner must pay any costs incurred by the amendment.¹⁰ When a petition is amended, the affidavits must be resworn.¹¹ When a solicitor presents a petition in his *own* behalf, attestation is in that case dispensed with.¹² But in this case, it must appear on *the face of the petition*, that he is a solicitor.¹³

¹ Ex parte *Clapham*, 1 Mont. & M. 51.

² Ex parte *Cadby*, Mont. 352.

³ 1 G. & J. 355, note (a).

⁴ Ex parte *Hirst*, 1 G. & J. 76.

⁵ Ex parte *Bellott*, 2 Mad. 259.

⁶ Ex parte *Tilley*, 2 Rose, 83.

⁷ Ex parte *Bury*, Buck, 393.

⁸ Ex parte *Dumbell*, 2 G. & J. 121.

⁹ Ex parte *Racine*, 1 G. & J.

19. Ex parte *Bury*, *supra*.

¹⁰ Ex parte *Green*, Mont. 518.

¹¹ Ex parte *Moath*, Mont. 520.

¹² Ex parte *Kingdon*, 1 Mad. 446.

¹³ Ex parte *Cole*, 2 G. & J. 269.

Ex parte *Barrow*, Mont. 92.

Where a petition is presented by a party in person, and he appears in support of it, his signature is sufficient, without any attestation.¹ An insufficient attestation is not waived by the respondent filing affidavits in answer.² In a case of emergency, a petition will be answered *instanter*.³

Where the solicitor attesting the petition was at the time in prison, it was held not an objection to the validity of the petition within the 12 Geo. 2, c. 13, s. 2, which makes void any process (sued out by a solicitor in prison) in any court of law or equity; for so highly penal a clause, it was considered, should be construed strictly; and a petition in bankruptcy was not then, strictly speaking, a proceeding either in law or equity.⁴

By the general order⁵ of 12th of January, 1832, all petitions presented to the court of review are required to be entered at the registrar's office, and the fiat directing the attendance thereon to be under the seal of the court of bankruptcy. The original petition, when served, must be returned to the registrar on or before the hearing, and be filed of record. And it is not necessary to recite such petitions at length in any order pronounced thereon. All the process of the court of review must be under the seal of the court of bankruptcy. All agreements of reference, to be made rules of such court, must be so made by order of the court of review; and all matters arising therefrom are to be heard and determined by that court, as well as all questions respecting the conduct of the officers and practitioners. All recognizances to be taken and acknowledged in the court of bankruptcy, must be taken and acknowledged before the court of review. And the practice in such court is to be conformed as nearly as may be to the former practice in matters before the lord chancellor.

The fiat upon a petition for hearing directs the attendance of parties⁶ thereon to be on the eighth day from the day of presenting it; and the petition must be served four days before the expiration of the time at which the attendance is required, except in the case of a petition to stay a certificate; the above time to be reckoned as inclusive of the days of presenting and serving the petition, but exclusive of Sunday, although an intermediate day.

¹ Re *Bruce*, 4 Russ. 223.

² Ex parte *Hutchinson*, Mont. 130.

³ Re *Mathews*, 1 D. & C. 35.

⁴ Ex parte *Thompson*, 1 G. & J. 308.

⁵ Rule xxx. et seq. See Vol. ii.

And see 1 Deac. & C. App. xxix.

⁶ General Order, 16th Jan., 1832.

See Vol. ii. and 1 Deac. & C. App. lvii.

When an application is made that a petition may stand over, the strict mode of proceeding is by petition presented for that purpose,—though Lord Eldon said he never knew the application by motion objected to.¹ But no application to hear a petition out of its turn can be entertained, unless notice of the intention to make such application has been given to the other side.² Formerly a petition would not be permitted to stand over, for the purpose of replying to affidavits, unless the application was made at least two days before the petition appeared in the paper.³ And when a petition was permitted to stand over, it was upon condition of paying the costs of the day; but it was not necessary that the order for these costs should be drawn up,—but there must have been an affidavit of the demand of them having been made, before the nonpayment of them could be urged, as a preliminary objection to the subsequent hearing of the petition.⁴

Petitions in matters of bankruptcy should be *served* upon the other party interested in the matter of the petition, by delivering a copy of it to him, or leaving it at his residence or place of business, at least two days before the day of petitions.⁵ But when the party is abroad, or wilfully keeps out of the way, a special order as to the service may be obtained by an application to the court for that purpose, which, it seems, may either be by petition or on motion.⁶ Thus, a petition to expunge a debt may, when the creditor is abroad, be served (with leave of the court) upon the attorney, who is appointed to receive the dividends upon the proof.⁷ And, under certain circumstances, where a party to be affected by a petition is out of the kingdom, the court will order, that service at his last place of abode in England shall be good service.⁸

If a party (after presenting a petition) becomes a bankrupt before the petition is heard, his assignee must present a supplemental petition, in order to have the benefit of that already presented; otherwise it will be dismissed.⁹

A party may be permitted to petition *in forma pauperis*, upon the usual certificate of counsel, that he had just cause

¹ *Ex parte Gitton*, Buck, 549.

² *In re Bell*, 1 G. & J. 182.

³ *Ex parte Wiltshire*, Buck, 232.

⁴ *Ex parte Leech*, 2 G. & J. 78.

This appears to be the right practice, and not that as laid down in *ex parte Clarke*, Mont. 503. 1 D. & C. 525.

⁵ 1 Mad. 74, 395. 15 Ves. 542.

⁶ Buck, 38. Ibid. 200.

⁷ *Ex parte Peyton*, Buck, 200.

⁸ *Ex parte Bonbonous*, 3 Mad. 23; and see *ex parte Anderson*, Buck, 28.

⁹ *Ex parte Birdwood*, Buck, 99.

to be relieved, and on making affidavit that he is not worth 5*l*.¹

By a general order,² no petition struck out of the vice-chancellor's paper (on account of non-attendance) could be restored to that paper, without an order being made by the vice-chancellor; nor could it be placed in the lord chancellor's paper, except by order made upon petition. And where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions.³

Before the hearing of any petition in bankruptcy, an affidavit of the service of it, and of the truth of its contents, must be filed at the registrar's office;⁴ otherwise it cannot be read; and an office copy of each affidavit must be produced when the petition comes on to be heard; for that is the only evidence which the court will admit of the affidavit having been filed.⁵ By *filing* an affidavit (as has been before observed) is meant, the swearing and carrying it into the office.⁶ But it is a general rule in bankruptcy, that an affidavit in support of a petition, which is *sworn before the petition is answered*, cannot be read; as there is no proceeding in court to which it can attach.⁷ The only exception to this practice, is in petitions to stay certificates.⁸ But filing an affidavit, in answer to the affidavit in support of the petition, has been held to be a waiver of the objection that the first was prematurely sworn,⁹—that is, provided the respondent had notice of the irregularity;¹⁰ though a party is not precluded, by filing affidavits as to the merits, from objecting to the jurisdiction.¹¹ Affidavits in support of petitions may be likewise objected to, if filed subsequently to the petition day;¹² though in one case they were specially permitted to be filed after the petition day, the petition standing over to give time for answering them, and the petitioner paying the costs of the day.¹³ But an affidavit in support of a *motion* may be filed at any time.¹⁴

An affidavit filed by the respondents only the evening

¹ *Ex parte Northam*, 2 V. & B. 124. 2 Rose, 140.

² June 11th, 1817.

³ *Ex parte Window*, 2 G. & J. 280.

⁴ *Ex parte North*, 1 Mad. 395.

⁵ *Ex parte North*, Buck, 396.

⁶ *Ex parte Newton*, 2 Rose, 19.

⁷ *Ex parte Northwood*, 2 Rose, 246. In re *Dickson*, 3 M. D. & D. 686.

⁸ Post, 895.

⁹ *Ex parte Gilpin*, 1 G. & J. 183.

¹⁰ *Ex parte Bury*, Buck, 393. *Ex parte Peel*, *ibid.* 394. *Ex parte Smith*, *ibid.* 395.

¹¹ *Ex parte Allison*, 1 G. & J. 210.

Ex parte Reid, 1 Deac. & C. 249.

¹² 2 Rose, 161. Buck, 549.

¹³ *Ex parte Sparrow*, 2 Mad. 184.

¹⁴ *Ex parte Gilton*, Buck, 549.

before the hearing of a petition, where the petition and the appointment for the hearing had been served for more than seven days, was not allowed to be read.¹

By 5 & 6 Vict. c. 122, s. 67, all affidavits to be used in matters of bankruptcy must be sworn either before the court of review, one of the subdivision courts, or any commissioner, the master, or any registrar or deputy registrar of the court of bankruptcy, a master in chancery, or in Scotland or Ireland, before a magistrate of the county, town, or place where the affidavit is sworn; or elsewhere, before a magistrate, and attested by a notary; or before a British minister, consul, or vice-consul.

No affidavit should be sworn before a master extraordinary who is solicitor to the fiat,² or who is the clerk to such solicitor;³ for, if it be, it cannot be read. But if the agent in town is the solicitor to the fiat, it would be then, it is apprehended, no objection to the affidavit, that it was sworn before the party's own solicitor in the country.⁴

An affidavit, as well as the petition,⁵ should be pertinent to the matter of the petition; for if it contains irrelevant⁶ or scandalous allegations, it will be ordered to be taken off the file,—with costs against the party making it, as between attorney and client.⁷

The usual course is to move or petition to refer it to the registrar in the first instance, which application must be made before the original petition is heard,⁸ and it is not a waiver of the respondent's right to refer a petition for impertinence, that he has on a former occasion succeeded in a formal objection to the petition.⁹

If a petition is presented, it need not state the scandal, and it must be by the party scandalized, although not a party to the original petition,¹⁰ and the respondent to the original petition need not be served.¹¹

The twelfth order as to proceedings in Chancery, which requires a party, who obtains an order to refer for scandal or impertinence, to procure the master's report within a fortnight after the date of the order, does not apply to cases in bankruptcy.¹²

¹ *Ex parte Hall*, Mont. 5.

² *Ex parte Brockhurst*, 1 Rose, 145.

³ *Ex parte Green*, 1 G. & J. 16.

⁴ *Read v. Cooper*, 5 Taunt. 89.

⁵ *Ante*, 874.

⁶ *Ex parte Hampson*, 2 M. D. & D. 462. Quare, as to irrelevancy, *ex parte Chisman*, 2 G. & J. 315.

⁷ *Ex parte Simpson*, 15 Ves. 476.

Anon. 3 V. & B. 93. 2 G. & J. 317.

⁸ *Ex parte Pelham*, Mont. 209.

⁹ *Ex parte Cunningham*, Mont. & M. 193.

¹⁰ *Ex parte Pelham*, Mont. 209.

¹¹ *Ex parte Kirby*, Mont. 68.

¹² *Ex parte Chester*, Mont. 17.

It is no objection to an affidavit, that it was not entitled in the matter of the bankruptcy in which it was used, if from the accompanying circumstances it is manifest that it was judicially used in the bankruptcy.¹

An affidavit verifying proceedings at law, was held to be irrelevant, and ordered to be taken off the file.²

A defect in any affidavit in support of a petition may be, in general, amended, by applying to the court for liberty to reswear it, and to permit the petition in the mean time to stand over.³

Affidavits in *reply* cannot be filed, except as to new matter contained in those filed, in answer to the petition; and, in that case, the court will permit a petition to stand over, to enable the party to reply to such new matter,⁴—provided the application is made two days before the petition appears in the paper.⁵ And, where the respondents were too late in filing their affidavits in answer to the petition, the court, upon the application of the petitioner, allowed the petition to stand over, to give the petitioner an opportunity of considering the affidavits, and of replying to them, if necessary; and as the delay was occasioned by the conduct of the respondents, he ordered them to pay the costs of the day.⁶

At the hearing of every petition, where the fiat on the petition so directs, the proceedings under the commission should be in court; but the examination of the bankrupt before the commissioners cannot be read upon the hearing, unless notice has been given of an intention to make use of it.⁷ But notice of an intention to read certain parts of the proceedings prevents other parts being read.⁸

On a petition to prove against the drawer of a bill, no evidence is required of his hand-writing, or of the notice of dishonour, where no objection was made on either of these grounds before the commissioner.⁹

Upon an objection that an instrument, upon which a petition is founded, is not stamped, the court will hear the petition, but subject to future order as to the stamp.¹⁰

Before an application can be made to vary the minutes of

¹ Ex parte *Simonds*, 2 G. & J. 44.

² Ex parte *Barnes*, 1 Mont. & M. 9.

³ 1 Rose, 145. 1 G. & J. 16.

⁴ Ex parte *Shayle*, Buck, 244.

⁵ Ex parte *Wiltshire*, *ibid.* 232.

⁶ Ex parte *Doncaster*, Buck, 463. Ex parte *Trustram*, *ibid.* 464.

⁷ Ex parte *Stracey*, 1 Rose, 68.

⁸ Ex parte *Langley*, Mont. 355.

⁹ Ex parte *Gill*, 3 Deac. 288.

¹⁰ Ex parte *Littlejohn*, 3 M.D. & D. 182.

an order, the parties must have been before the registrar to settle the minutes.¹

The practice of the court in directing an *issue*, or an *action at law*, upon the hearing of a general petition in bankruptcy, is the same as upon a petition for a *supersedeas*.

If, upon the day appointed for the hearing, the petitioner does not appear when the petition is called on, the respondent must in that case produce an office copy of the affidavit (and this may either be of his own affidavit or the affidavit of the petitioner²) of service before the rising of the court, in order to be entitled to costs.³

An order made upon the hearing of any petition in bankruptcy requiring any act to be done, must be personally served upon the party on whom the order is made. But where a party keeps out of the way to avoid the service, the court, upon affidavit of the fact, will in that case direct that service of the order at the house or office of the party shall be deemed good service.⁴

When a matter in bankruptcy was under the old practice referred to a master, and he found it necessary to examine witnesses, a certificate had to be procured from him of the necessity of such examination, upon which the court would make the usual order.⁵ But any affidavits, which might have been read at the hearing of the petition in court, might be received in evidence by the master.⁶ Upon a petition for leave to except to the master's report of costs, the petitioner was obliged to pay the taxed costs into court.⁷

When under an order in bankruptcy money is directed to be paid, the next order is to pay within four days, or stand committed;⁸ this is of course at the office; but, if circumstances render an application to the court necessary, notice must be given to the other side,⁹ and the application should be by petition, and not on motion.¹⁰

Upon the service of this order, a demand should be made for payment of the money, otherwise an order will not be made for the commitment of the party; or if committed, the court will discharge the commitment with costs.¹¹

¹ *Ex parte Vittery*, Mont. & M. 435.

² *Ex parte Garth*, 2 G. & J. 392.

³ *Ex parte Astell*, Buck, 396.

⁴ *Ex parte Anderson*, Buck, 38; and see *ex parte Bowler*, *ibid.* 258.

⁵ *Anon.* 4 Mad. 379.

⁶ *Ex parte Jackson*. *Ex parte Heywood*, 1 Rose, 45.

⁷ *Ex parte Leigh*, 4 Mad. 394.

⁸ *Ex parte Davison*, 1 G. & J. 227.

⁹ *Ex parte Green*, 1 M. D. & D. 473. *Ex parte Solomons*, 1 M. & A. 269, note. *Ex parte Smith*, 2 M. & A. 213.

¹⁰ *Ex parte Myers*, 4 D. & C. 579.

¹¹ *Ex parte Dicus*, Mont. 215.

Where an order of committal is asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on an intermediate order.¹ The practice in bankruptcy differs in this respect from the practice in chancery, where an intermediate order *nisi* is necessary before the final order.

The court will, in general, rehear a petition upon fresh evidence tendered, but not a petition to stay the certificate, or to annul the fiat.² But a petition cannot be reheard, unless the order made on the former hearing is drawn up.³

Upon a petition for rehearing, the order may be obtained upon an *ex parte* application; and it is not necessary to give notice to the other side.⁴ There is no settled rule to prevent the lord chancellor from rehearing a petition of appeal in bankruptcy.⁵

Vivâ voce examinations.] By the 1 & 2 Will. 4, c. 56, s. 38, the judges and commissioners of the court of bankruptcy have power to take the whole, or any part, of the evidence, either *vivâ voce* upon oath, or upon affidavits; and by the 5 & 6 Vict. c. 122, s. 68, a similar power is given to the several subdivision courts, and the courts authorized to act in the prosecution of any fiat. Although the court of review has heard a case partly on affidavit, yet it has power to examine *vivâ voce* the parties who have made affidavits;⁶ and when the court makes a general order for the examination of parties *vivâ voce*, there is no need for a special order as to any particular witness, but the proper course is to take out a subpoena.⁷

Where a petition is part heard, and stands over to have particular witnesses examined *vivâ voce*, fresh affidavits cannot be filed.⁸ Where a *vivâ voce* examination is ordered, as to the act of bankruptcy, the assignees must give notice of what act of bankruptcy they rely on, but they are not bound to furnish a list of witnesses.⁹

¹ *Ex parte Murray*, 1 M. & A. 478; and see Lord Cottenham's judgment in *ex parte Green*, 1 M. D. & D. 474.

² *Ex parte Lavender*, 4 D. & C. 497.
³ *Ex parte Jenkins*, 1 D. & C. 222. Mont. 513.

⁴ *Ex parte Hensor*, Buck, 427.

⁵ *Ex parte Baker*, Mont. & M. 279.

⁶ *Ex parte Howell*, 1 D. & C. 358.
Ex parte Fell, 3 M. D. & D. 472.
Ex parte Melvill, *ibid.* 474.

⁷ *Ex parte Palmer*, 1 D. & C. 341.

⁸ *Ex parte Fry*, Mont. 519; 1 D. & C. 487; but see *ex parte Fell*, 3 M. D. & D. 472; and *ex parte Hutton*, *ibid.* 474.

⁹ *Ex parte Foster*, 3 Deac. 175.

Petitions to Annul a Fiat.

When the bankrupt applies to annul a second fiat—on the ground of a former one having issued against him, under which he has not obtained his certificate—he should give notice to the creditors under the first fiat; this is done, by serving a copy of the petition on the assignees under the first two days at least before the day of petitions.¹ It was a general rule, also, that every petition for a *supersedeas* by a creditor must be served upon the bankrupt, whether the commission has been opened or not.² But in a subsequent case, Lord Lyndhurst said, that on consideration he thought proper to vary the rule, where the commission was *not opened*, and dispensed with the service of the petition on the bankrupt, reserving to him, however, in the order for the *supersedeas*, all his rights, whether by action or petition.³ A petition to annul a joint fiat, presented by one of the bankrupts, must be served upon the other, although it only seeks to annul the fiat as regards the petitioner.⁴ And where the objection arising from want of such service was taken by the court, and the petition was re-answered, that it might be served upon the other bankrupt, but before this was done, the time prescribed by the 5 & 6 Vict. c. 122, s. 24, for taking proceedings to dispute the fiat, had run out; it was held that the court had nevertheless jurisdiction to entertain the petition, and to direct the assignees to admit in an action brought against them by the bankrupt, that the action was commenced within the time prescribed by the act.⁵ An affidavit of service should also be made and filed; for the court can act upon such an affidavit in cases of *supersedeas*, as well as in other cases. Where the ground of the application is a legal objection to the commission—if a great length of time (such as a year and a half for instance) has intervened between the issuing of the commission and the application—the court will not grant an issue to try the bankruptcy, but leave the party to bring his action.⁶ If the bankrupt is out of the kingdom, and there is a doubt

¹ Ex parte *Irvine*, 1 Mad. 74.
Ex parte *Rhodes*, 15 Ves. 542.
² Rose, 451.

³ Ex parte *Barber*, Buck, 493.
Anon. 1 G. & J. 23. Ex parte
Forth, 1 Mont. & M. 10.

⁴ Ex parte *Palmer*, Mont. & M.
211.

⁵ Ex parte *Vessey*, 3 M. D. & D.
420.

⁶ Ibid.

⁷ Ex parte *Nutt*, 1 Atk. 102.
Ex parte *Abell*, 1 G. & J. 199; and
ex parte *Maxwell*, 3 M. D. & D.
713; and see ante, 865.

of the bankruptcy, the court will not annul the fiat on petition, but send it to trial:—if he is in England, and the question is not involved in doubt, the court will decide at once upon the affidavits—or will sometimes send it back to the commissioner to consider—if, on evidence taken before them, they can declare the party a bankrupt or not.¹ So, on a petition to reverse the adjudication, for the insufficiency of the petitioning creditor's debt, a reference may be made to the commissioner to receive any further depositions of the debt, or vary the existing depositions.² And, upon the hearing of all petitions to annul a fiat, the proceedings under it ought to be produced for the inspection of the court of review;³ and though there are no affidavits on the other side in support of the fiat, and no notice has been given that the proceedings will be produced, the court will nevertheless look into them, to see whether the depositions will support the fiat, before it makes any order to stop the sale of the bankrupt's effects.⁴ But though the court itself will look at the proceedings, it will not permit the bankrupt to inspect them.⁵ But where he petitions to annul the fiat, or reverse the ad-

¹ *Ex parte Gulston*, 1 Atk. 193.
Ex parte Lord, 2 Ves. 26.

² *Ex parte Gartley*, 2 M. & A. 524.

³ *Ex parte Dodson*, 1 Mont. B. L. 664.

⁴ *Re Atkinson*, 1 M. D. & D. 239.

⁵ *Ex parte Vypond*, 1 Mad. 624.

It is, certainly, difficult to comprehend the justice of this rule of practice, which prevents the bankrupt from inspecting the proceedings against him, for the purpose of assisting him in applying to supersede the commission. In other cases, as it is justly observed by Sir Wm. Evans, a party has an opportunity of hearing and opposing the evidence, as well as of examining the documents upon which legal proceedings have been instituted against him; but here the opportunity is withheld; and if he wishes to arraign the regularity of the procedure, he must take his steps at random, and in the dark. There is no other instance, indeed, in the whole compass of our jurisprudence, in which a person is thus

affected in a judicial proceeding by evidence, which he has not an opportunity to know, to comment upon, and to contradict. Whatever convenience may be derived from certain rules of practice in point of arrangement, there are nevertheless great and fundamental principles of justice, to which all matters of practical detail should be considered as essentially subordinate. When a party, therefore, wishes to appeal from what has been done, and to submit it to the regular course of examination and inquiry, there can be no motive of convenience sufficient to countervail that essential principle of justice, which requires that he should be at least admitted to know, to oppose, and to controvert (if he is able) the allegations of the opposite party and of witnesses, which (being taken in his absence) he had not at the time the opportunity to contradict, or to oppose—and upon which alone he may possibly have been involved in ruin.

judication, on the ground that he has not committed an act of bankruptcy, the court will order him to be furnished with copies of the depositions relating to the act of bankruptcy,¹ or order them to be read in court, so as to give him an opportunity of answering them;² and the proceedings are not evidence against him, unless previous notice is given to him of the intention to use them,³ and copies of them previously tendered.⁴ The bankrupt, when he applies to annul, is expected to give a *particular* answer to the facts charged in the depositions taken before the commissioners, as well as the affidavits on the other side;—for a mere general affidavit that he is not a bankrupt has been held not sufficient to support the application.⁵

Where a creditor petitions to annul, he must not only state that he was a creditor at the time of issuing the fiat, but also at the time of presenting the petition.⁶ The court will frequently, when the affidavits are contradicted and the evidence is conflicting, direct an issue to try the fact of the bankruptcy, or an action to be brought—the practice being to take the assistance of a jury, when there is so much of doubt, that such assistance is felt to be necessary to the right determination of the case. And where upon a petition to supersede for fraud in concocting a trading and petitioning creditor's debt, and praying costs against several persons, an issue is directed, such directions will be given as to afford each person interested an opportunity of protecting himself at the trial.⁷ If an action is directed to be brought, the bankrupt ought to be confined to such objections to the fiat, as he would have been entitled to make under his petition, and leave ought not to be given to him to amend the petition by introducing a statement, which, with reasonable diligence, might have been introduced into it originally.⁸ But though the affidavits are conflicting on both sides, yet the court will not put the parties to the expense of a trial, without first hearing all the evidence read, and the case fully argued;—unless the counsel on both sides agree that such must necessarily be the result if the matter is gone into.⁹ And where

¹ *Ex parte Smith*, 3 D. & C. 101.
² *Ex parte Jackson*, 2 D. & C. 601.

³ *Ex parte Lavender*, 4 D. & C. 486.

⁴ *Ex parte Goodwin*, 1 Deac. 695.

⁵ *Ex parte Thurkill*, 2 M. & A. 672.

⁶ *Ex parte Lingood*, 1 Atk. 241.
Ex parte Stokes, 7 Ves. 405.

⁷ *Ex parte Flight*, 1 D. & C. 78.
 Mont. 515.

⁸ *Ex parte Hudson*, 2 Russ. 457.

⁹ *Ex parte Veysey*, 3 M. D. & D. 402.

¹⁰ *Ex parte Heygate*, Buck, 442.
Ex parte Trustrum, Buck, 550.

the court requires further investigation, and an issue would not do justice to all parties interested, without occasioning great expense and great complaining in the proceedings, the court will prefer a reference to the commissioners.¹

Where the bankrupt vexatiously petitions to annul for want of an act of bankruptcy, which he is evidently aware of having committed, the petition will be dismissed with costs.²

Where an issue was directed upon the petition of the bankrupt to supersede the commission, the court ordered the petition to stand over until such a fixed time, as in all probability the issue would be tried.³ So, where it appeared by the statement in a petition, that an action at law was commenced to try the validity of the commission, the court would not supersede the commission, but deferred the consideration of the petition until the event of the trial was known.⁴ And if from any circumstance the trial does not take place within the prefixed period, the bankrupt must make an affidavit, satisfactorily accounting for the delay of the trial; or his petition will be dismissed.⁵ If, on such a petition, no act of bankruptcy appear on the proceedings, and the court thinks fit to permit the assignees, or the petitioning creditor, to try whether or not there was any act of bankruptcy in an issue or an action,—it will require that they deliver to the bankrupt previously to the trial a particular of the specific act or acts of bankruptcy, on which they intend to rely.⁶ And, upon such an order, the plaintiff must in the notice not only specify the *acts* relied on—but also the *times* when they were committed, and the *witnesses* who will be called to prove them.⁷

The pendency of an indictment, however, against the bankrupt and the petitioning creditor for a conspiracy, is not a ground for deferring the hearing of a petition to annul, if the parties indicted do not object to proceed.⁸

When the court directs the trial of an action at law, it is the intention to place the parties in such a situation, as though the action had originally commenced there;⁹ and after an order has been made, that a petition shall stand over with liberty to bring an action, &c., a bill of discovery cannot be

¹ *Ex parte Hudson*, 2 Russ. 457.

² *Ex parte Thompson*, 4 D. & C. 594.

³ *Ex parte Ranken*, 3 Mad. 371.

Ex parte Billiald, Buck, 220.

⁴ *Ex parte Price*, Buck, 230.

3 Mad. 228.

⁵ *Ex parte Ranken*, *supra*.

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⁶ *Ex parte Sherwood*, 2 Rose, 162. 17 Ves. 416, 417.

⁷ *Ex parte Bogen*, Buck, 137; and see the form of such a notice, as settled by Lord Eldon, *ibid.* 144.

⁸ *Ex parte Bromley*, Mont. & M. 92.

⁹ Buck, 298.

filed by the bankrupt without leave of the great seal.¹ But where a material witness was abroad, and the court of law put off the trial on that ground, the lord chancellor ordered that the bankrupt should be at liberty to file a bill for a commission to examine the witness abroad.² When an action is directed to be brought, all proceedings under the fiat are ordered to be suspended in the mean time; but if the action establishes the bankruptcy, the court will not (without special ground) allow a longer suspension; nor is it a sufficient ground, that justice was not done to his case by his counsel in the first trial³—or that the bankrupt is about to bring another action, and therein to put his objections to the commission upon the record, in order to carry it by writ of error to the House of Lords.⁴ And where the result of the action is to establish the fiat, the petition to annul it will be dismissed, without putting the assignees to the expense of a counter petition.⁵ But if the bankrupt has a verdict in such an action, the court will not in that case, unless under very special circumstances, delay annulling the fiat until after another trial; and it is not a sufficient ground, that the assignees have evidence to support the fiat, which they were prevented from producing by surprise; for, in such an action, assignees must be presumed to know that the bankruptcy is disputed, and ought to be provided with evidence to support it.⁶ So, where upon an issue to try whether a bankruptcy was concerted or not, the jury found that it was,—the lord chancellor refused to grant a new trial to prove other acts of bankruptcy not concerted;⁷ for the court will never support a commission, which is founded on a fraudulent and illegal proceeding.⁸

In directing an issue, the court will not, in general, order the examination of persons at the trial, who (by the rules of the courts of law) could not be examined without such order—except sometimes in cases, where the facts in dispute rest only on the knowledge of the plaintiff and defendant.⁹ But where the case requires it, the court will direct the bankrupt to be examined.¹⁰ And where a petitioner swore positively to a debt, and was contradicted by the bankrupt, and there was

¹ *Cooke v. Marsh*, 18 Ves. 209.

² *Ex parte Coles*, Buck, 293.

³ 1 V. & B. 218, 219.

⁴ *Ex parte Bryant*, 2 Rose, 1.

1 V. & B. 220.

⁵ *Ex parte Caponhurst*, Buck, 476.

⁶ *Ex parte Dick*, 1 Rose, 51.

⁷ But see now 1 & 2 Will. 4. c. 56, s. 42.

⁸ *Ex parte Prosser*, Buck, 77.

⁹ *Ex parte Dister*, Buck, 234.

¹⁰ *Ex parte Staff*, Buck, 431.

no other evidence,—in this case, both the bankrupt and the petitioner were ordered to be examined.¹

With respect to the mode of applying for a new trial, the practice differs, according as an issue, or an action, is directed:—in the former case, the motion must be made to the court by which the issue was directed—in the latter case, to the court in which the action is brought; and the rule is not affected by any special provisions as to imposing terms, &c., by which the direction of the action is accompanied.² But a motion to put off the trial may be made in the court of law, as well upon an issue, as in an action.³ An application for the judge's notes on a petition for a new trial, is a motion of course.⁴

Where the assignee is not a creditor of the bankrupt, and is alleged to be so much identified in interest with him, that an action (brought by the bankrupt to try the validity of the commission) would not be properly tried if the assignee defended it,—the petitioning creditor has been directed to have the management of the defence, upon fully indemnifying the assignee.⁵

Though a commission had not been opened, the court sometimes interfered by motion,⁶ and it might be superseded with the consent of the petitioning creditor;⁷ but it could not be superseded before it had been sealed, though the chancellor would in a case of hardship give directions that it should not be sealed.⁸

A bankrupt, as well as any other suitor, whose circumstances require it, may petition *in formâ pauperis*, to annul a fiat.⁹

Where sales of the estate had taken place under the commission, the lord chancellor sometimes required an affidavit from the bankrupt of his confirmation of all purchases under it, before he would supersede it;¹⁰ and, at other times, refused to supersede it altogether,¹¹ even though it had been fraudulently issued;¹² but the provisions introduced into the new acts for the protection of purchasers¹³ will, perhaps, in

¹ Ex parte *Williamson*, Buck, 546; and see ex parte *Carter*, 1 G. & J. 326.

² *Carstairs v. Stein*, 2 Rose, 178. 4 M. & S. 192.

³ *Buxton v. Lawton*, 4 Camp. 163.

⁴ Ex parte *Harwood*, Mont. 8.

⁵ Ex parte *Stewart*, 2 Rose, 6.

⁶ 1 Mont. Dig. 134.

⁷ Ex parte *Trigwell*, 1 V. & B. 348.

⁸ Ex parte *Williams*, 2 V. & B. 253.

⁹ Ex parte *Northam*, 2 V. & B. 124. 2 Rose, 140.

¹⁰ Ex parte *Milner*, 19 Ves. 204.

¹¹ *Twoood v. Hankey*, Buck, 67.

¹² Ex parte *Edwards*, 10 Ves. 104.

¹³ See ante, 735.

future prevent the necessity of so much caution in this respect.

Where a fiat is annulled, after adjudication, for want of any of the legal requisites, it is always at the costs of the petitioning creditor.¹

After a petition for annulling the fiat has been heard and disposed of by the court of review, the lord chancellor can only interfere in his appellate, and not in his original jurisdiction in bankruptcy; and an appeal to remove the order on such a petition must be brought before him by way of special case, unless he shall otherwise direct, which direction will only be given under very special circumstances.²

Petitions to stay the Certificate.

Petitions to stay the certificate, like other petitions in bankruptcy,³ must, by a general order of Lord Eldon's, be *signed* by all the petitioners before they are presented—except in cases of partnership, or absence from the kingdom; in the former of which cases the signature of one of the partners will be sufficient; and in the latter case, the petition must be signed by the person presenting it on the behalf of the person so abroad. The signature of each person must, also, be attested by the solicitor actually presenting the petition, or by some person who must state himself in his attestation to be attorney, solicitor, or agent of the party signing. And where there was a defect in the signature of a petition to stay the certificate, the vice-chancellor refused to permit it to be re-signed in court.⁴ And the court will not, unless under very special circumstances verified by affidavit, dispense with the strict observance of this order.⁵ The object of requiring the attestation of a solicitor, is to have his pledge and responsibility to the propriety of the application. Where, therefore, the signature of the petition purported to be "*authenticated*," not "*attested*," by his solicitor—who, in fact, had not witnessed the signature, but merely put his name to it from a knowledge of the petitioner's hand-writing, the lord chancellor thought that the spirit of the order had in this

¹ *Ex parte Fletcher*, 2 D. & C. 374.

² *Ex parte Stubbs*, 3 Deac. 549.

³ See General Order, 12th August, 1809.

⁴ *Ex parte Barrow*, Mont. 92.

⁵ Anon. 1 Rose, 97. *Re Bolders*,
ibid. 231.

instance been complied with.¹ But an attestation by the *agent to the solicitor* has been held to be not a compliance with the order.²

The court will not extend the time for receiving a petition for the disallowance of a certificate, which must be presented within the twenty-one days from the notice in the *Gazette*.³ For where a motion was made on the last day, that a petition might be received only two days afterwards, (which in fact had been already prepared, but was not properly signed,) the motion was refused.⁴ And though the allowance of a certificate may be delayed by a previous petition presented within the twenty-one days, yet if another petition to stay it is presented *after* the twenty-one days, though during the period of its suspension, it will be dismissed with costs.⁵

Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the certificate.⁶

It must appear from the petition itself, that the party applying is a creditor; if, however, it merely so appear inferentially, that is sufficient, but not if it appear merely from the affidavits; and no amendment is ever allowed of the petition.⁷

A petition to stay the certificate *prospectively*, that is, before the bankrupt has passed his last examination, it seems, cannot be supported.⁸

A copy of the petition, with the answer of the court to it, must be *personally* served upon the bankrupt two clear days at the least before the petition day,⁹ otherwise the petition will be dismissed with costs. And, though the bankrupt even admits the receipt of a copy of the petition;¹⁰ or his solicitor acknowledges that the bankrupt was fully aware of the petition and its nature;¹¹ or takes copies of the affidavits in support of it,¹² or files affidavits in answer,¹³ or even appears to the petition by applying to the court to

¹ Ex parte *Titley*, 2 Rose, 83.

² Ex parte *Weston*, 1 Mad. 75.

Ex parte *Hirst*, 1 G. & J. 76.

³ See ante.

⁴ Ex parte *Emmett*, 1 Mad. 111.

⁵ Ex parte *Wright*, 1 G. & J. 352.

⁶ Ex parte *Bostock*, 1 D. & C. 383.

⁷ Ex parte *Robinson*, 4 D. & C. 499.

⁸ Ex parte *Groome*, Buck, 39.

⁹ Ex parte *Harford*, Buck, 38.

Ex parte *Hopley*, 1 G. & J. 63. 2 Jac. & W. 220. Ex parte *Hetherington*, 4 D. & C. 218.

¹⁰ Ex parte *Furnival*, 1 G. & J. 254.

¹¹ Ex parte *Levy*, 4 D. & C. 224.

¹² Ex parte *Kendall*, 1 V. & B. 543.

¹³ 2 Rose, 115.

Ex parte *Harford*, supra.

have the petition advanced in the paper,¹—yet neither of these circumstances is a waiver of his right to be personally served; neither is it a sufficient excuse, that the omission to serve the bankrupt in proper time was occasioned by the death of the creditor, and that his executor served it as soon as he was legally entitled to act.² When the bankrupt is not duly served with the petition, it is not necessary for him to take any notice of it whatever;³ but merely to present a *short petition*, praying that his certificate may be allowed;⁴ after which, he has a right to call for his certificate on the morning of the petition day. And where the bankrupt unnecessarily extended this petition, by praying that the petition of the opposing creditor, which had not been duly served, might be dismissed with costs—and thus compelling the creditor to appear upon the hearing,—the vice-chancellor refused to give the bankrupt the costs of his petition.⁵ The court will, however, where there is a difficulty of meeting with the bankrupt, make an order (upon the application of the petitioner) that service of the petition at the bankrupt's residence shall be deemed good service,—provided the application is made before the petition day; and if the petitioner is prevented, by the conduct of the bankrupt, from making the application in proper time, and has used reasonable diligence, the court will then make such order, notwithstanding it is not applied for before the petition day.⁶ But it is the general rule of the court to construe the practice strictly in favour of the certificate.⁷

An affidavit of the *service* of the petition must be filed, not later than on the day of the hearing. Where the affidavit is imperfect, the court has permitted the petition to stand over for an hour for time to file another, and has afterwards directed it to be adjourned, in order to give the bankrupt time to answer; but if, under such circumstances, the second affidavit is not filed when the petition is adjourned, and is filed subsequent to the day of the hearing, it will then be treated as no affidavit, and the petition will be dismissed with ⁸ costs.

¹ Ex parte *Grooms*, Buck, 39.

² Ex parte *Coulbourn*, 2 Rose, 187; and see 2 Mont. 154.

³ Ex parte *Kendall*, 1 V. & B. 543. 2 Rose, 115.

⁴ Ex parte *Moore*, 1 G. & J. 253; and see 2 Mont. B. L. 154.

⁵ Ex parte *Birch*, 2 G. & J. 206.

⁶ Ex parte *Harrison*, 1 G. & J. 71.

⁷ 2 Mont. B. L. 154, and cases there cited.

⁸ Ex parte *Long*, 1 G. & J. 351.

An affidavit must also be made of the *truth* of the facts alleged in the petition; which latter must state all material facts, so as to make a *prima facie* case for staying the certificate; for the petitioner will not be permitted to supply the defect of his *original case*, by filing affidavits in reply.¹

A petition for liberty to prove a debt, and stay the certificate, must state that the proof will turn the certificate.² But it seems that the petition need not state *when* the debt was rejected, or *what* debt was rejected.³

By a general order of Lord Loughborough,⁴ qualified by one of Lord Eldon,⁵ all affidavits made in support of petitions presented against the allowance of a certificate, must be filed in the bankrupt office at the time when such petitions are left in the office, except such affidavits as are necessary to be made in *reply* to any affidavits made in answer to the petition. And no petition is to be received against the allowance of any bankrupt's certificate, unless the affidavits in support of such petition are filed when the petition is left; in default of *which*, the certificate is to be forthwith⁶ allowed and confirmed.

The term "*filing an affidavit*" is construed to mean the swearing and carrying it into the office.⁷

No affidavit, therefore, in support of a petition to stay a certificate, which is filed *after* the petition is presented, can be read at the hearing;⁸ such an affidavit being, from necessity, an exception to the rule applicable to affidavits on *other*⁹ petitions in bankruptcy, viz. that an affidavit, sworn previous to the petition being answered by the court, is inadmissible in evidence.¹⁰

With respect to affidavits *in answer*, the practice is, to hear the petition for staying the certificate, and then for the court to say,¹¹ whether affidavits in answer are necessary. And if the bankrupt do not file his affidavits in answer till after the petition day, the petitioner against the certificate is entitled to have the petition stand over, that he may have an oppor-

¹ Ex parte Cundall, 1 G. & J. 37.

⁷ Ex parte Newton, 2 Rose, 19.

² Ex parte Shipp, 1 D. & C. 497.

⁸ Ex parte Dodson, Buck, 178.

³ Ex parte Robinson, 1 M. & A. 246.

⁹ See ex parte Northwood, 2 Rose,

705.

¹⁰ Ex parte Overton, 2 Rose,

⁴ 12th April, 1796.

257.

⁵ 16th November, 1805.

¹¹ Ex parte Gardner, 1 Rose,

⁶ And see ex parte Bouces, 1 Ves. 378.

540.

tunity of replying to any new matter in the bankrupt's affidavits.¹

There is one case, however, in which the strictness both of the order as to the filing the affidavit when the petition is presented, and of the general rule applicable to affidavits on other petitions, seems to have been in some degree departed from. For, where the time for presenting a petition expired on the 18th, and a petition was presented on the 16th and an affidavit filed—and on the 18th the petitioner gave notice to the bankrupt, that he intended to read some former affidavits made in the same bankruptcy, and among them, one of the bankrupt himself—and the chancellor's order to hear the petition was not made till after the 18th;—Lord Eldon was of opinion, that the notice being given before the *fiat*, it was in time—notwithstanding it was contended, that as no new affidavits could have been filed, and the notice was in effect the same as filing an affidavit, it was consequently too late.²

No petition to stay a bankrupt's certificate can be withdrawn without the leave of the court; which will not be granted, unless the parties presenting it make affidavit, that it is not withdrawn from improper motives.³

But where an order for staying the certificate has been already obtained, and is afterwards abandoned, and the party who obtained the order appears by counsel to consent to the allowance of the certificate, such an affidavit is not necessary.⁴

Where a petition to stay or disallow a certificate is dismissed, it is generally dismissed with costs; but cases have occurred where such petitions have been dismissed *without* costs—on the ground, that although the bankrupt was entitled to his certificate, there were circumstances in his conduct which afforded suspicion of collusion, or which precluded all claim to the indulgence of the court.⁵ And where the petition is dismissed for default of appearance of the petitioner, the certificate will not be ordered to go, without an affidavit that there is no collusion.⁶

A petition to stay a certificate is an exception to the regular course of proceedings; and as the granting or withholding it is

¹ Ex parte *Radcliffe*, Buck, 489.

² Ex parte *Emmett*, 2 Mont. Dig. 153.

³ Ex parte *Gibson*, 6 Ves. 5. 1 C. B. L. 465; and see ante, 629.

⁴ Re *Hall*, 2 D. & C. 44.

⁵ Ex parte *Black*, 1 Rose, 67.

note (a.) Ex parte *Gardner*, 1 Ves. & B. 45. Ex parte *Stevens*, Buck, 389.

⁶ Ex parte *Hetherington*, 1 M. & A. 607; 4 D. & C. 234.

a question of such extreme importance to the bankrupt, it may be heard out of its turn, upon a special application for that purpose.¹ And where petitions were presented in the vacation to stay certificates, upon the ground merely that the *petitioner's debt* would turn the certificate—and the bankrupt has contradicted that allegation;—Lord Eldon referred it to the secretary of bankrupts, or the commissioners, to look into the proofs upon the proceedings—with a direction, that if the bankrupt were correct in his contradiction, the certificate should be allowed; his lordship thinking, that this was a question which had a strong claim to the early attention of the court.² When an order is obtained on a petition to stay a certificate, it must be drawn up and taken away from the bankrupt office in three months, otherwise the court will allow the certificate.³

A creditor, by petitioning to stay the certificate, makes his election to come in under the fiat for every proveable debt which may be owing to him from the bankrupt; and, therefore, the bankrupt must be discharged from any action pending against him by the creditor, before the petition can be proceeded in.⁴ And the rule is, on the hearing of such a petition, that the party objecting to the certificate must himself make out a case to stay it; for the bankrupt is not bound to answer mere allegations founded on information and belief.⁵ The non-payment of any dividend is not, of itself, a sufficient reason to stay it.⁶ The court will not, as in ordinary cases, rehear a petition to stay the certificate, upon fresh evidence tendered.⁷

The assignees cannot be heard on a petition by an individual creditor to stay the certificate, although they have been served with the petition.⁸

Appeal to the Lord Chancellor.

A party can only appeal to the lord chancellor from the court of review, on a matter of law or equity, or on the refusal or admission of evidence. The appeal also must be on a special case, unless the lord chancellor shall otherwise

¹ *Ex parte Anderson*, 1 Rose, 93.

⁵ *Ex parte Green*, 4 D. & C. 112.

² *Ex parte Bank of Scotland*, 1 Rose, 376. 1 V. & B. 6.

⁶ *Ibid.*

⁷ *Ex parte Lavender*, 4 D. & C.

³ General Order, 22nd March, 1796.

⁸ *Ex parte Bostock*, 1 D. & C. 383.

⁴ *Ex parte Bostock*, 1 D. & C. 383.

direct; and the special case must be approved and certified by one of the judges of the court of review, whose determination on the settlement of the case is final and conclusive.¹ And on every appeal from a commissioner to the court of review, upon a question of any *proof of debt*, the order of that court is also final, unless an appeal to the lord chancellor be lodged within one month from such determination.² This period cannot be extended; nor can the signature of the party to the petition of appeal be dispensed with, except by authority of the lord chancellor.³

It has been determined that this limitation for the time of appeal, upon a question of *proof* under the 1 & 2 Will. 4, c. 56, s. 32, applied only to *London* fiats.⁴ It may be a question, however, whether, since the passing of the 5 & 6 Vict. c. 122, the limitation does not equally apply to *country* fiats.

An appeal from the refusal of a motion by the court of review should be by way of special case, and not by way of motion, before the lord chancellor.⁵

By a general order,⁶ the special case on every appeal tendered for the approval of one of the judges of the court of review, must be left for that purpose at the office of the registrar, signed by the counsel for the respective parties, or accompanied with a certificate from the counsel for the appellant, that there is in their judgment good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party eight days prior to such tender thereof.

Whenever a party is entitled to appeal, it is not discretionary in the court of review to grant a special case, but he has a right to it, if his facts are properly stated.⁷ But where the question is, whether the party is, or is not, a trader, this is not the subject of an appeal, it being a pure question of fact.⁸ And where a petition of appeal was presented to the lord chancellor, after one of the judges of the court of review had refused to certify a special case, on the ground that the question was one of fact, the petition was dismissed, with costs.⁹ Nor is it a ground of appeal, that the court of

¹ 1 & 2 Will. 4, c. 56, s. 3.

² Ibid. s. 32.

³ Ex parte *Robinson*, 2 D. & C. 583.

⁴ Ex parte *Fidgeon*, 4 Dea. 217.

⁵ Ex parte *Carruthers*, 3 M. D. & D. 269.

⁶ 22nd May, 1833, 2 D. & C. 632.

⁷ Deac. 303.

⁸ Ex parte *Hinton*, 2 D. & C. 407.

⁹ Ibid.

¹⁰ Ex parte *Woodward*, 3 Dea. 293.

review rejected evidence as superfluous, in not carrying the party's case further.¹ Neither does an appeal lie to the lord chancellor against the settlement of a special case by a judge of the court of review, for refusing to introduce into the case a statement of certain facts, which the appellant contends ought to be inserted in it; the third section of 1 & 2 Will. 4, c. 56, declaring that the determination of the judge in the settlement of the case shall be final and conclusive.²

If the party who has obtained a special case certified by the chief judge, do not proceed with the appeal, the court will order him to pay the costs.³

An objection that the court of review has no jurisdiction, cannot be taken before the lord chancellor on appeal, if it was not taken in the court below;⁴ nor will the lord chancellor decide upon an objection that the matter is one of fact, and not of law, until he hears the petition through.⁵

The lord chancellor will not make an order that an appeal shall be brought on by petition instead of special case, except under special circumstances,⁶ and not merely on the ground that the matters of law and fact were of a complicated nature, or that the affidavits were voluminous.⁷

Where a party obtains an order of the lord chancellor to hear an appeal on petition, instead of on a special case, and the order is improperly obtained, the respondent must move to set it aside, and not wait to make his objection to the form of proceeding until the petition is called for hearing.⁸ Nor will the lord chancellor, at the hearing, permit the appellant to present a petition for liberty to proceed "otherwise," for the purpose of rectifying an error in the settlement of the special case, the determination of the judge of the court of review being final in this respect, and the lord chancellor having no jurisdiction with reference to the settlement of the case.⁹

In applying for a special case, the counsel for the appellant is bound to state to the judge of the court of review the ground of appeal; and the case itself should state the conclusion of fact found by the court, and not the evidence at length by which the facts were proved.¹⁰

¹ Ex parte *Low*, 1 Coop. Sel. Ca. 154.

² Ex parte *Stubbs*, Mont. & Ch. 511; 3 Deac. 549.

³ Ex parte *Hawley*, 3 D. & C. 655.

⁴ Ex parte *Turner*, 1 M. & A. 357.

⁵ Ex parte *Keys*, 3 D. & C. 263.

⁶ Ex parte *Stubbs*, 3 Deac. 549; Mont. & Ch. 537.

⁷ Re *Maberly*, 1 Deac. 75.

⁸ Ex parte *Keys*, 3 D. & C. 263.

⁹ Ex parte *Low*, 1 M. & A. 189. 1 Coop. Sel. Ca. 154. Ex parte *Stubbs*, 3 Deac. 549.

¹⁰ Ex parte *Wilson*, 3 Deac. 214. Ex parte *White*, 3 M. D. & D. 7.

Where after the judgment of the court of review had been reversed on appeal by the lord chancellor, and the matter referred back for consequential directions, one of the parties had obtained leave from the lord chancellor to appeal to the House of Lords, unaccompanied by any order as to stay of proceedings; it was held that this had not the effect of staying the proceedings in the court of review, although it was a circumstance to guide the court, in the exercise of its discretion, whether it would make any consequential order till the appeal was determined.¹

¹ *Ex parte Pollard*, 4 Deac. 275.

CHAPTER XXII.

OF COSTS.

SECT. 1. *Of the Costs of issuing a Fiat up to the Choice of Assignees.*

2. *Of subsequent Costs.*

3. *Of Costs upon Petition.*

4. *Of Costs in Actions and Suits by and against Assignees, and other Parties concerned in the Fiat.*

5. *When Security for Costs will be required.*

For the *Proof of Costs under the Fiat*, see ante, Chap. IX. Section 19; and see further as to the *Taxation of Costs*, Chap. XXIII. Section 3.

SECTION I.

Of the Costs of issuing the Fiat.

The petitioning creditor must prosecute the fiat at his own costs until the choice of assignees;¹ when the commissioners are directed by the statute to ascertain such costs, and order the assignees to reimburse him out of the first money that is got in under the commission. The bill of these costs, when taxed and allowed by the commissioner, should be filed and kept with the proceedings. If any party is dissatisfied with the taxation of them by the commissioner,² he may petition the court of review to refer it to a master to review their taxation; but such an application is not a matter of course, without stating particular objections to the taxation of the commissioner; though it may be so in an ordinary case, when the bill has not been previously taxed.³ If the solicitor, however, refuses a copy of his bill,

¹ 6 Geo. 4, c. 16, s. 14.

² Ex parte Vincent, 1 C. B. L.

11. Ex parte Clarke, ibid. Ex parte Theoball, 1 Rose, 397.

³ Ex parte Hewitt, Buck, 388.

that is a sufficient ground for referring it to a master.¹ Where objectionable charges have been allowed, it will be ordered to be taxed.² And where the charges appeared to be exorbitant—as where they amounted to 109*l.*,—that, of itself, was held a sufficient reason to order the bill to be taxed, even after payment made, and after the death of the assignee who made the payment.³ And the same, where objectionable items are pointed out on affidavit, although the bill had been paid for two years.⁴ So, where the bill had been taxed at 97*l.* 10*s.*, and the commissioners had excluded the parties from attending the taxation.⁵

Where the assignees neglected to have a solicitor's bill of costs up to the choice of assignees taxed by the commissioners, it was held that the bankrupt might, after having settled with the creditors, apply to the general jurisdiction of the court, and obtain an order for the taxation of the bill by the commissioners.⁶ But where the bill, after being taxed by the commissioners, had been paid, and the assignees' account had been audited for the space of six years, the court refused to order a re-taxation of it.⁷

In some cases it will be referred to the commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate;⁸ or certain law charges, where the estate has derived a benefit.⁹

The provision in the statute, for ascertaining the costs when the assignees are chosen, is merely directory; and it will be no objection to the petitioning creditor's right to be reimbursed, that all the costs of prosecuting the commission (previous to the choice of assignees) were not then actually taxed by the commissioners.¹⁰ And although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees.¹¹ Where, however, he assents to a different appropriation of the assets by the assignees, he is estopped from afterwards

¹ Ex parte *Sutton*, 4 Mad. 395, 479.

² Ex parte *Hattersley*, 2 D. & C. 373.

³ Ex parte *Neale*, Buck, 111. Ex parte *Heyden*, 2 G. & J. 52.

⁴ Ex parte *Moore*, 1 Deac. 578.

⁵ Ex parte *Palmer*, 2 G. & J. 34.

⁶ Ex parte *Bayley*, Mont. 208.

⁷ Ex parte *Christy*, 4 D. & C. 414, and see ex parte *Woolston*, 3 M. D. & D. 702.

⁸ Ex parte *Booms*, 4 D. & C. 392.

⁹ Ex parte *Hadfield*, 2 Deac. 115.

¹⁰ Ex parte *Haynes*, 1 G. & J. 35.

¹¹ Ex parte *Abram*, 4 D. & C. 401.

contending that the directions of the statute have not been complied with.¹ When an assignee happens to be removed, the petitioning creditor cannot claim the costs from such removed assignee, unless any collusion can be proved between him and the existing assignees.²

The solicitor to the petitioning creditor may petition that the assignees may pay him the amount of the petitioning creditor's costs up to the choice of assignees;³ to which petition, it seems, the petitioning creditor is a necessary party; but neither the solicitor nor the petitioning creditor can petition for the payment of the costs, before the commissioner has ordered payment.⁴ But a petitioning creditor, who complains that the assignees have not complied with the commissioner's order for the payment of the costs, may apply to the court of review in the first instance, and without previously summoning the assignees before the commissioner to produce their accounts.⁵

In case there are not sufficient assets, the petitioning creditor, and not the assignees, is personally liable to the solicitor for the costs up to the choice of assignees.⁶ But in one case of this kind, the vice-chancellor said, that he had no jurisdiction to order the petitioning creditor to pay these costs, though he was liable to the solicitor in an action at law, like any other client.⁷ In another case, however, where a commission was even superseded by the bankrupt for invalidity, the court there made an order on the petitioning creditor to pay the messenger his bill up to the choice of assignees.⁸

Where the petitioning creditor's debt is found insufficient to support the commission, and *the debt of another* creditor is ordered to be substituted by the lord chancellor under the 18th section of the new statute, the original petitioning creditor is not liable to costs, if the commission has only failed through his mistake of law or fact, but such costs will be ordered to be paid out of the estate; *aliter*, if he has been guilty of fraud or misconduct.⁹

¹ *Hornidge v. Byland*, 2 Scott, 357.

² *In re Gibson*, 1 G. & J. 303.

³ *Ex parte Benson*, 2 M. & A. 582.

⁴ *Ex parte Cooper*, 2 M. D. & D. 420.

⁵ *Ex parte Rushworth*, 3 M. D. & D. 318.

⁶ *Ex parte Haynes*, *supra*; and see ante, 102.

⁷ *Anon. Buck*, 475; and see post, "Solicitor."

⁸ *Ex parte Johnson*, 1 G. & J. 23.

⁹ *Ex parte Cousins*, 2 G. & J. 270; but see *ex parte Ullathorne*, 1 M. D. & D. 338, and cases there cited; see also *ex parte Smith*, 3 M. D. & D. 347.

SECTION II.

Of Costs subsequent to the Choice of Assignees.

By the 5 & 6 Vict. c. 122, s. 69, the several subdivision courts, and the court authorized to act in the prosecution of any fiat, in all matters before such courts respectively, may award such costs as to such courts shall seem fit and just, and may cause the amount to be recovered from the party in the same manner as costs awarded by a rule of any of the superior courts.

Before the 6 Geo. 4, c. 16, the commissioners had only power to tax the costs up to, and including the choice of assignees;¹ the taxation of all subsequent costs being directed² to be made by a master in chancery, whose certificate of taxation, when *signed* by him, was conclusive, and excluded the jurisdiction of the chancellor.³ This limitation of the jurisdiction of the commissioners was found to be very inconvenient in practice; as the taxation of the bill by a master is attended with considerably more expense and delay; and this the assignees were either obliged to incur, or else were compelled to submit to improper charges. A remedy, however, is now provided for this inconvenience by the 6 Geo. 4, c. 16, s. 14, which directs that all bills of fees or disbursements of any solicitor or attorney, for business done after the choice of assignees, shall be settled by the commissioners, except so much of such bills as may contain any charge respecting any action or suit, which is to be settled by the proper officer of the court. And if any creditor to the amount of 20*l.* be dissatisfied with the taxation of the commissioners, he may have the bill taxed by a master in chancery, who is to receive for the taxation and the certificate thereof 20*s.*, and no more.

And by 5 & 6 Vict. c. 122, s. 83, all bills of charges, fees, and disbursements of any auctioneer, appraiser, broker, valuer, or accountant, employed by any assignee, or messenger, or bankrupt, are to be settled by the court authorized to act in the prosecution of the fiat, and the amount so settled, and no more, can be recovered by the party so employed.

The commissioners ought to tax any costs from time to time as they occur, and not to wait until the whole business of the commission is concluded.⁴

¹ 5 Geo. 2, c. 30, s. 25.

² *Ibid.* s. 46.

³ *Ex parte Neale*, 2 G. & J. 226.

⁴ *Ex parte Gore*, 2 G. & J. 117.

When a creditor is dissatisfied with the taxation of the commissioner, he must present a petition for an order to have the bill settled by a master in chancery; for, without such order, the master would have no authority to act.¹ And the petition need not be served on the assignees.² The payment of the costs, after taxation, can be enforced by petition to the court of review.³

As to the costs of any action, suit, or other proceeding, the assignees themselves are personally answerable for these costs to the solicitor whom they employ; ⁴ but in case of a deficiency of assets, (though there is no provision of this kind in the statute,) they may come for contribution upon the creditors who have proved debts under the commission, provided such costs were legally and properly incurred, and the proceeding was instituted with the sanction of the creditors.⁵ Thus, extra costs incurred by assignees in conducting prosecutions for perjury and conspiracy, instituted with the sanction of the creditors, were directed to be allowed out of the estate under the 6 Geo. 4, c. 16, s. 106.⁶ But if the assignees choose to prosecute a suit in equity, without the consent of the major part in value of the creditors of the bankrupt (pursuant to the provision of 6 Geo. 4, c. 16, s. 88,) ⁷—they cannot, in that case, come either upon the creditors or the estate of the bankrupt for the costs of such suit, though they are personally liable themselves to the solicitor employed by them.⁸

With respect to the general costs of working the commission, the assignees are directed (by the 101st section of the 6 G. 4, c. 16,) to keep an account of all payments made by them on account of the bankrupt's estate; which account, every creditor who has proved a debt has a right at all reasonable times to inspect. And by the 106th section, they are also required to deliver in upon oath a true statement in writing of all their receipts and payments at the meeting appointed by the commissioners to audit their accounts; ⁹ upon which audit, the assignees are to be allowed to retain all such money as they shall have expended in suing out and prosecuting the commission, and other just allowances.

¹ Ex parte *Hickman*, Mont. & M. 352.

² Ex parte *Payne*, Mont. 455.

³ Ex parte *Coates*, 3 D. & C. 626. And see further, post, as to taxation of solicitor's bill.

⁴ 2 Camp. 175. 1 Star. 278; and see ante, 329. Ex parte *Coates*, 3 D. & C. 626.

⁵ Ex parte *Leathwaite*, 16 Ves. 234.

⁶ Ex parte *Strange*, 1 Mont. & M. 31.

⁷ See ante.

⁸ Ex parte *Whitchurch*, 1 Atk. 210.

⁹ See ante.

By section 35, where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the commissioner, such person may have such costs and charges as the commissioners shall think fit. And every *witness*, summoned to attend before the commissioner, shall have his necessary expenses tendered to him in like manner as is by law required, upon service of a *subpoena* to a witness in an action at law.

The statute thus makes a material difference between a *witness*, and a person *suspected* to have any of the bankrupt's estate in his possession; for the latter is bound to attend, although his expenses should not have been previously tendered to him;¹ though if he be in reality without the means of taking the journey, that perhaps may be an excuse for not obeying the summons.² But it seems (as Lord Eldon observed upon one occasion) more consistent with justice that the costs should be ascertained after the examination, rather than before it; for the result of the examination will afford a clearer view of what the party examined is entitled, in point of expense, to be reimbursed. As, if an adjournment of the meeting take place from time to time, it will then be impossible (without taking this into consideration) to ascertain correctly the expenses, *eundo, redeundo, et morando*. Or, if a person so to be examined had concealed the property of the bankrupt, it would then be matter of regret that the assignees had (as a condition precedent to his examination) been obliged to pay a sum of money to one, who had thus anticipated his own repayment.³

When costs are ordered to a party so summoned before the commissioner, they may be recovered in an action of *assumpsit* against the assignees; and it is not necessary that the order for the costs should be in writing.⁴

When a witness, or other party summoned before the commissioner, is arrested, and applies to be discharged from the arrest, the costs of the application will, in general, depend upon whether a *contempt* was intended or not by the party arresting. If the arrest amounts to a contempt, they will be ordered to be paid by the officer or person causing the arrest; and in one case where the witness was arrested by the bankrupt, they were so ordered to be paid.⁵

¹ Ex parte *Roscoe*, 2 Rose, 348.
Ex parte *Benson*, *ibid.* 75. *Baillie*
v. *Gresley*, 8 East.

² *Ibid.*

³ 2 Rose, 348.

⁴ *Yarker v. Botham*, 1 Esp. 64.

⁵ Ex parte *Byrne*, 1 V. & B. 316;
and see ante.

The joint creditors under a separate fiat are not entitled to have the expenses of a solicitor, employed by them to conduct examinations, &c. before the commissioner, paid out of the joint fund.¹

SECTION III.

Of Costs on Petition.

It is a general rule, that if there has been no misconduct in the bankrupt, a *petition to stay a certificate*, when dismissed, is dismissed with costs to be paid by the creditor opposing the certificate.² But, when there are circumstances in the conduct of the bankrupt which preclude him from any claim to the indulgence of the court, the petition is then frequently dismissed without costs;³ and this notwithstanding he may be strictly entitled to his certificate.

With respect to costs on a *petition to annul the fiat*:—Where a *bankrupt* petitions to annul the fiat, and an issue is directed, though he fails upon the trial of the issue, he escapes the payment of costs, and the costs of the assignees are paid out of the estate; for the court has, in general, no power to give costs against an uncertificated bankrupt.⁴ The consequence of this exemption has been, however, that petitions of this kind have multiplied to the great oppression of creditors, and the waste of the bankrupt's effects; as the costs, even of the successful defence against such petitions, must fall upon the estate. Where the facts, therefore, are disputed upon such a petition, and the bankrupt is in a situation to try the validity of the fiat at law, the court will (unless under special circumstances, where directions may be necessary to assist the trial,) leave him to his action at law; for if he fails in an *action*, he pays costs like any other plaintiff.⁵ And where the bankrupt is really in a situation to try the validity of the fiat at law, he will not be allowed the costs of a petition to annul

¹ Ex parte *Longman*, 1 Rose, 303.

² Ex parte *Warwick*, 14 Ves. 138. Ex parte *Bank of Scotland*, 1 Rose, 375. 1 V. & B. 5.

³ Ex parte *Stracy*, 1 Rose, 67. Ex parte *Black*, *ibid.* note. Ex parte *Nichols*, *ibid.* Ex parte *Ken-*

net, *ibid.* 331. Ex parte *Gardner*, 1 V. & B. 45. 1 Rose, 377. Ex parte *Stevens*, Buck, 389. Ex parte *Enderby*, 5 Mad. 76. Ex parte *Bryant*, 1 G. & J. 205.

⁴ But see post.

⁵ Ex parte *Billiald*, Buck, 220.

it, notwithstanding he has a verdict on an issue in his favour, and an order to annul is thereupon made; for he ought to have proceeded in the first instance at law, instead of presenting a petition to annul.¹ Therefore, though the assignees will be directed to pay the costs of the trial, they will not be made to pay the costs of the petition; for it is their duty, as trustees for the creditors, to appear and resist any petition of the bankrupt to annul the fiat.² And where a commission was superseded merely for a defect in form as to the petitioning creditor, and there was no doubt as to the act of bankruptcy, &c., the costs of the *supersedeas only* were allowed, though it would have been otherwise if the act of bankruptcy had not been fully proved.³

But, notwithstanding the court has, in general, no power to give costs against a bankrupt while the commission is subsisting,—yet where on the petition of a creditor a commission is ordered to be superseded, on the ground of *concert* between the bankrupt and the petitioning creditor, the court has, in such a case, ordered the costs of superseding it to be paid by the bankrupt and the petitioning creditor.⁴

If, upon the bankrupt's application, an order is made to annul the fiat, with costs to be paid by the petitioning creditor and the solicitor who sued it out, the bankrupt may proceed against both of them or either.⁵

When the petitioning creditor succeeds in resisting the bankrupt's application to annul the fiat, he will be allowed his costs of opposing the petition out of the bankrupt's estate as between attorney and client;⁶ and the like in the case of an assignee opposing the petition.⁷ But when the petition charges collusion, and the circumstances are suspicious, costs will not be given, though the petition fails.⁸ And if the petitioning creditor does not succeed in resisting the application, he will then be directed to pay the costs of annulling the fiat, and of the petition—as well as the costs of any proceeding at law or in equity in the matter—to the bankrupt, or the creditor who succeeds in annulling it.⁹ For, though costs are not, in general, given to a party upon an appeal from the deliberate judgment of the commissioner, even though his judgment appears to be

¹ Ex parte Marks, 1 G. & J. 70.

² Ex parte Edwards, Buck, 232.

³ Ex parte Goodwin, 1 Atk. 101;
and see ex parte Hylliard, 1 Atk.
147.

⁴ Ex parte Green, 1 G. & J. 188.

⁵ Ex parte Bishop, 8 Ves. 333.

⁶ Ex parte Bottomley, 5 Mad. 91.

⁷ Ex parte Bryant, 2 Rose, 1.

⁸ Ex parte Stevens, 4 Mad. 256.

⁹ Ex parte Gulston, 1 Atk. 139.

140. Ex parte Heming, Buck, 350.

wrong,¹ (except indeed in cases of fraud,)—yet the rule does not extend to *ex parte* cases, where the opposite side had not (as in the case of the adjudication of the bankruptcy) the opportunity of being heard before them, and the commissioner, therefore, was not in reality able to exercise a deliberate judgment.²

Where a separate fiat is annulled merely to give effect to a subsequent joint one, the petitioning creditor under the first commission (unless he has been acting *malâ fide*) receives all the costs out of the joint estate, whether arising out of the first fiat or the petition to annul; and if he is a joint and separate creditor, he may elect whether he will be paid such costs out of the joint, or separate estate.³ But the costs of a fiat annulled for non-prosecution will not be permitted to be paid out of the bankrupt's estate.⁴

If a fiat is sued out contrary to good faith, the party has a right to make a formal application to the court to annul it, with a view to be indemnified against any costs he may have incurred, by the fiat being taken out and not proceeded in,—notwithstanding the fiat would have been supersedable at the bankrupt office under the general order.⁵

Where a creditor states a case of fraud against the bankrupt which he fails in proving, the petition for annulling the fiat will then always be dismissed with costs.⁶

Where a fiat was annulled with costs to be paid by the petitioning creditors—and one of them (who was a *feme sole*) married after the costs were taxed,—her husband was ordered to pay the taxed costs within a fortnight.⁷

On the taxation of costs after an order made to annul the fiat, on the bankrupt's petition, a charge for consulting counsel previously to presenting the petition, and a fee to a second counsel on the hearing, if the petition is one of a special nature, ought to be allowed.⁸

With respect to costs upon *other petitions* in bankruptcy,—it is a general rule, that if a petitioner do not pray for costs in his petition, he cannot have them awarded to him.⁹ But, nevertheless, if he does pray costs, and his petition is

¹ *Ex parte Allen*, 1 C. B. L. 2.
Ex parte Moggridge, *ibid*.

² *Ex parte Greenway*, Buck, 412.

³ *Ex parte Brown*, 1 Rose, 433.
Ex parte Smith, 1 G. & J. 256.

⁴ *Ex parte Sanden*, 1 Rose, 87.
Ex parte Ellis, 7 Ves. 135. *Ex parte Leicester*. *Ex parte Layton*. *Ex parte Hardwicke*, 6 Ves. 429.

⁵ *Ex parte Lowe*, 1 G. & J. 78.

⁶ *Ex parte Levi*, Buck, 75.

⁷ *Ex parte Eagle*, Buck, 548.

⁸ *Ex parte Ellis*, 3 M. D. & D. 600.

⁹ *Ex parte Atkinson*, Buck, 215.
Ex parte Daintry, Mont. 7.

dismissed, it will be dismissed with costs.¹ But costs, though not specifically prayed in a petition, may nevertheless be given under the word "*expenses*," if expenses be prayed in it.² And where upon a petition to except to taxation, which did not pray costs, an order to retax was made, the petition praying confirmation of the certificate of retaxation may pray the costs of the original petition.³ Where a petition is presented in a case, in which the court has no jurisdiction, the respondent is always entitled to the costs of opposing it.⁴ Where a petition also is unnecessary, the petitioner is liable to costs.⁵

Costs are never given to a party upon a general petition (any more than on a petition to annul) appealing from the deliberate judgment of the commissioner,⁶ notwithstanding his determination appears to have been wrong, and the court may have thought it necessary to direct an issue, or a trial at law. But where the determination of the commissioner is *ex parte*, and the person affected by his decision has no opportunity of being heard, we have already seen,⁷ that this rule does not prevail. And where a creditor, after the rejection of his proof by the commissioner, succeeds in obtaining an order for that proof, the costs are ordered to be paid out of the bankrupt's estate.⁸ Where an issue is directed by the court, and the result of the trial is against the decision of the commissioner,—in this case, also, as in the case of a petition to annul,⁹ the costs of the issue are allowed,¹⁰ but not the costs of the petition.¹¹

When a petition is ordered to stand over, the costs of the day will be ordered to be paid by the party occasioning the delay.¹² But they can only be obtained by a special order of the court made at the time of adjourning the hearing of the petition. When an order is made for the payment of "the costs of and occasioned by the present application,"—such order includes the costs of an interlocutory order, which was made in pursuance of part of the prayer of the petition.¹³

If a petitioner makes default in not appearing when the petition is called on, the respondent must produce an office

¹ *Ex parte Columbine*, 2 M. D. & D. 24.

² *Ex parte Hardenburgh*, 1 Rose, 204.

³ *Ex parte Spurr*, Mont. 6.

⁴ *Ex parte Allison*, 1 G. & J. 210.

⁵ *Ex parte Rodgers*, 1 D. & C. 38.

⁶ *Ex parte Allen*. *Ex parte Moggridge*, 1 C. B. L. 2.

⁷ *Ante*.

⁸ *Ex parte Fiske*, Mont. & M. 93.

⁹ *Ante*.

¹⁰ 1 Mont. Dig. 141.

¹¹ *Ex parte Edwards*, Buck, 232.

¹² *Ex parte Doncaster*, Buck, 463.

¹³ *Ex parte Green*, 1 G. & J. 188.

copy of the affidavit of service before the rising of the court, in order to be entitled to costs.¹

A petition, not properly attested by a solicitor pursuant to the general order,² will be dismissed with costs.³ And costs will also be given against a party, who makes groundless imputations in a petition, notwithstanding an order might have been made upon one part of the prayer of it.⁴ Costs, also, as between attorney and client, will be given against a party, who makes an irrelevant or scandalous affidavit in support of a petition.⁵ And a petition will in all cases be dismissed with costs, where the relief prayed is provided for by a general order.⁶

When the master makes his report, after costs are referred to him to be taxed, and a petition is presented for leave to except to the report, the petitioner must pay the taxed costs into court.⁷

It is a general rule, that no court permits an appeal against an order for costs only.⁸ Therefore a party cannot apply to correct an order (once signed and passed in respect of costs) by a separate petition as to the costs alone; but when the question is, not as to the personal payment of costs, but whether they shall be payable out of a particular fund, a petition for rehearing may then be presented for determining that question.⁹

Where several persons are directed to pay costs, the court will not in bankruptcy determine the proportions in which they ought to contribute amongst themselves. For the question of contribution is altogether collateral to the bankruptcy, and is the proper subject of an action at law, or a bill in equity for an apportionment.¹⁰

In general (as has been already stated)¹¹ costs cannot be given against an uncertificated bankrupt,¹² notwithstanding he presents a petition which is dismissed even on the ground of its being multifarious,¹³ or unnecessary.¹⁴ But in a case of fraud, misconduct, or vexation, the court will subject him to costs—as, where he presented a third petition for the same

¹ Ex parte *Astell*, Buck, 296.

² August 12th, 1809.

³ Ex parte *Rawlinson*, 1 G. & J. 19.

⁴ Ex parte *Vernon*, 13 Ves. 270.

⁵ Ex parte *Simpson*, 15 Ves. 476. Anon. 3 V. & B. 93.

⁶ Ex parte *Watts*, 1 Rose, 436.

⁷ Ex parte *Leigh*, 4 Mad. 394.

⁸ Ex parte *Slack*, 1 C. B. L. 2.

⁹ Ex parte *Baines*, 1 G. & J. 259.

¹⁰ Ex parte *Wilmhurst*, 1 G. & J. 4, 244.

¹¹ Ante.

¹² 1 C. B. L. 2. Ex parte *Wright*, 2 Ves. 11. Ex parte *Billiald*, Buck, 220.

¹³ Ex parte *Coles*, Buck, 256.

¹⁴ Ex parte *Parker*, *ibid.* 313.

purpose as two former, which had been dismissed, the court made an order that he should pay the costs, and if he were unable to pay them, that he must be committed;—observing, that it was like the case of a pauper dispaupered for misconduct—and that if a bankrupt behaved ill, so he ought, in like manner, to lose his privilege.¹ So, likewise, in a case of fraud, costs will be given on a bill filed against an uncertificated bankrupt.² And though the court has refused, upon dismissing a bankrupt's petition, to give the respondent costs out of the estate, the solicitor of the bankrupt was in one case ordered to pay 40*s.* costs to the respondent for presenting a petition, which was deemed by the court to be wholly unnecessary.³ When a bankrupt petitions for leave to surrender after the time for the surrender is expired, he in that case pays the costs of the application.⁴

Upon a petition to remove an assignee for the convenience of the estate, the assignee does not in such case pay the costs.⁵ Nor is a removed assignee liable to the petitioning creditor for the payment of his bill of costs as taxed by the commissioners, unless there is collusion proved between the removed and the new assignee.⁶

Upon a petition by joint creditors to prove against the separate estate, no costs are given, where there are no joint effects nor solvent partner.⁷

When an equitable mortgagee petitions for a sale of the mortgaged premises, he is entitled to costs, if there is a *written* instrument specifying the agreement upon which his claim arises;⁸ notwithstanding parol evidence may be necessary to explain it.⁹ If the agreement be partly by parol, the costs will be apportioned;¹⁰ and if the memorandum be lost, the extra costs only, occasioned by the loss, are paid by the mortgagee.¹¹ But where there is a *mere deposit* of the title-deeds, without any written instrument to explain the purpose of the deposit, the mortgagee pays the costs of his petition.¹²

The proper mode to recover costs which are ordered on petition in bankruptcy is to present a short petition for that

¹ Ex parte *Shaw*, 2 Ves. jun., 40; and see ex parte *Green*, 1 G. & J. 188.

² *Lock v. Bromley*, 3 Ves. jun., 40.

³ *Buck*, 313; and see post, "Solicitor."

⁴ Ex parte *Carter*, 4 Mad. 394.

⁵ *Anon.* 5 Mad. 76.

⁶ Ex parte *Gibson*, 1 G. & J. 303.

⁷ Ex parte *Bradshaw*, 1 G. & J. 99.

⁸ Ex parte *Brightwen*, 1 G. & J. 148. Ex parte *Sikes*, *ibid.* 349;

but see ex parte *Horne*, 1 Mad. 623. 2 Mad. 281.

⁹ Ex parte *Vauxhall Bridge Company*, 1 G. & J. 101; and see ex parte *Trew*, 3 Mad. 372.

¹⁰ Ex parte *Ford*, 3 M. D. & D. 457.

¹¹ Ex parte *Rodgers*, 3 M. D. & D. 297.

¹² Ex parte *Warry*, 19 Ves. 472. Ex parte *Garbutt*, 2 Rose, 78; and see ante.

purpose, which must not state additional allegations;—otherwise it will be held irrelevant, and will be dismissed with costs. And where the petition is against assignees, if they have no assets in hand, it will fail upon the merits.¹

When an application is made for the discharge of a party, who has been arrested in an attachment for not paying costs pursuant to an order, previous notice must be given to the other side, however strong the grounds may be for his discharge.²

Any writ of attachment, or other writ issued by a subdivision court, or other court authorized to act in the prosecution of any fiat, or an order of such court for the non-payment of costs, on the deputy registrar's *allocatur*, must be sealed with the seal of the court of bankruptcy by the chief registrar in Basinghall-street.

In one case, where costs were awarded upon a petition in bankruptcy, Lord Redesdale would not permit them to be made the subject of an action at law.³

Upon a petition against *commissioners*, they will not be ordered to pay costs, unless in respect of conduct out of the course of their duty as commissioners;⁴ and when they are made parties to a petition without sufficient grounds, they will then be entitled to costs.⁵

SECTION IV.

Of Costs in Actions and Suits by and against Assignees, and other Parties concerned in the Fiat.

Where an assignee is made a party to an action or suit, for the purpose of sustaining a litigated fiat, he is entitled to his costs out of the bankrupt's estate, as between attorney and client. For, as a bankrupt whenever he thinks fit can bring an action against his assignee—and it is the assignee's duty upon every occasion of this kind to sustain the interest of all the creditors as well as his own—it is highly reasonable that he should be in all such cases completely indemnified; otherwise few persons would be prevailed on to accept the office of assignee.⁶

¹ Ex parte *Hinton*, Mont. & M. 207.

² Ex parte *White*, 1 D. & C. 39. Mont. 517.

³ In re *Dillon*, 1 Sch. & Lef. 110. Dub. tam Lord Ellenborough, *Har-rop v. Jukes*, 2 M. & S. 439.

⁴ Ex parte *Scarth*, 14 Ves. 104. 15 Ves. 293; and see ex parte *Davidson*, 2 M. D. & D. 375.

⁵ Ex parte *Steele*, 16 Ves. 161.

Ex parte *Davidson*, 2 M. D. & D. 375.

⁶ Ex parte *Bryant*, 2 Rose, 1.

When notice has been given in an action by or against assignees to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy,—if the assignees prove the matter so disputed, or the other party admit the same on the trial, the judge is empowered,¹ if he thinks fit, to grant a certificate of such proof or admission, which will entitle the assignees to the costs occasioned by the notice, to be taxed by the proper officer, and added or deducted according as the verdict may be. But this provision of the statute will not entitle the assignees to costs, where they have been nonsuited.² A similar provision is also made as to suits in equity,³ when, if the assignees prove the matter so disputed, the court (if it see fit) may order the party giving the notice to pay the taxed costs occasioned by it: and the service of the notice may be proved upon the hearing of the cause.

Assignees, though suing in a representative capacity, are not within the exemption from costs given by the 23 Hen. 8. c. 15, to executors and administrators; nor will the court, when the assignees are nonsuited upon the trial, suspend the payment of costs until they receive sufficient assets to pay them, notwithstanding they make an affidavit that they have no assets in hand.⁴

The 39 & 40 Geo. 3, c. 104, which deprives a plaintiff of costs where the sum recovered is less than 5*l.*, has been held to extend to assignees; but where the defendant in such case had disputed the petitioning creditor's debt, the court ordered the suggestion to be so entered, that the plaintiff might not be deprived of the costs thereby occasioned, but only of those costs which would have been incurred had no notice been given.⁵

Where an action was commenced by assignees under a former commission, which was superseded, and the assignees under a subsequent commission brought a fresh action—the court of King's Bench refused to stay proceedings until the costs of the former action were paid, though the cause of action was the same.⁶

When an action is brought against an assignee (or indeed against any other party) by the direction of the lord chancellor, it is a constant rule in the court of Chancery to make

¹ 6 Geo. 4, c. 16, s. 90.

² *Atkins v. Seward*, 1 B. & B.

275.

³ 6 Geo. 4, c. 16, s. 91.

⁴ *Andrews v. Sealy*, 8 Pri. 212.

⁵ *Ward v. Abrahams*, 1 B. & A.

367.

⁶ *Dawson v. Sampson*, 2 Chitt.

Rep. 146.

the defendant pay all costs, if he defeats the action by a formal objection.¹

If assignees improperly resist a plaintiff's demand, and are brought before the court by supplemental bill, they may be made liable to the costs of the whole suit; but where no application is made to them by the plaintiff before the filing of the bill, such costs will not in that case be given against them.²

By 6 Geo. 4, c. 16, s. 44, it is provided, that if upon the trial of an action brought against any person for anything done in pursuance of that statute, there shall be a verdict for the defendant—or, if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto—or if, upon demurrer, judgment shall be given against the plaintiff,—the defendant shall in either of these cases recover double costs. This right, however, to double costs will not entitle the party to receive twice the actual amount of single costs, but only the common costs, and *one-half* of the common costs.³ In like manner treble costs, where given by any statute, are composed of, first, the common costs; secondly, *half* of those costs; and lastly, *half* of the latter half.

When the assignees are defendants, they are not entitled to double costs; nor is any defendant, who is acting generally under the authority of the assignees without a warrant from the commissioner, entitled to double costs.⁴

When the commissioners incurred any costs, in defending an action brought against them by any person for an act done by them in the strict discharge of their duty, they had a right to be compensated by the assignees, notwithstanding the assignees had in fact not received sufficient to pay the expenses of the commission.⁵

A bankrupt is personally liable for the costs of an action commenced and proceeded in by the assignees in his name, notwithstanding he has obtained his certificate; though when he acts fairly he will be protected from such costs.⁶

Whenever a bankrupt brings a second action for the same cause as a former one, in which the merits were fully tried, and the second action appears to be evidently vexatious, the proceedings therein will be stayed until the costs of the

¹ Per Lord Kenyon, *Wray v. Barois*, Peake, 69.

⁴ *Worth v. Budd*, 2 B. & Ad. 176.

² *Whitcomb v. Minchin*, 5 Mad.

234.

91.

³ *Hullock*, 484.

⁶ Ex parte *Seaman*, 1 G. & J.

260.

former action are paid. Thus where a bankrupt petitioned that the commission might be superseded, or that an issue might be ordered to try the validity of the petitioning creditor's debt, and the petition was dismissed—upon which he brought an action of trover against his assignees, and a verdict was found against him, which for a long period was acquiesced in—and then, after the division of the effects by the assignees another action was brought for money had and received;—it was held, under these circumstances, that the proceedings in the second action should be stayed until the costs of the former one were paid.¹ And where an uncertificated bankrupt (after being nonsuited in an action of trespass for false imprisonment in the court of King's Bench, on the ground of not being prepared with evidence to prove the validity of a former commission) brought a fresh action in the Common Pleas,—the last-mentioned court ordered the proceedings to be stayed until he paid the costs of the former action, considering that he ought to have been prepared with such evidence upon the first trial.²

Where an action was brought against a bankrupt by *executors* after he had obtained his certificate, he was held not entitled to costs, though he recovered a verdict;—for the bankrupt statutes, the court said, were to be construed in the same manner as the 23 Hen. 8, c. 15, and the 4 Jac. 1, c. 3, which first gave a defendant costs upon obtaining a verdict; and those statutes are held not to apply to executors.³ And where a bankrupt who was sued as executor, pleaded a false plea, and a verdict was found against him—and the plaintiff obtained judgment for his costs *de bonis propriis*,—it was held, that though the bankrupt afterwards obtained his certificate, he was still liable to be taken in execution for the costs.⁴

When a man brings an action *ex contractu* against a bankrupt, whether before or after a fiat has issued, he takes the chance of losing his costs, in case the *debt* should be barred by the certificate; for the *costs* cannot in such a case be distinguished from the debt; and if the party be discharged from the one, he cannot remain liable to the

¹ *Gravenor v. Cape*, Say. Costs, 245, 3rd edit. Wils. 150. 2 Bl. 741.

² *Crawley v. Impey*, 8 Taunt. 407. 2 Moore, 460.

³ *Martin v. Norfolk*, 1 H. B. 528. This case was decided with reference to the 5 Geo. 2, c. 30, s. 7, which enacted, that the bankrupt, when

he succeeded in an action brought against him after obtaining his certificate, should "recover his full costs." In the parallel section (126) of the 6 Geo. 4, c. 16, there is, however, nothing said about costs.

⁴ *Howard v. Jemmett*, 3 Burr. 1368. 1 Bl. 400.

other. Therefore, if a debt arise before, but a verdict is obtained, and the costs taxed after, the bankruptcy of the defendant, (though previous to the allowance of the certificate)—the costs relate to and are considered as a part of the original debt, and the certificate extends to both.¹

The costs of a judgment, as in case of a nonsuit entered up against the plaintiff after he has become bankrupt, cannot be set off against the costs of an action by the assignees against the defendant in the former action.²

SECTION V.

When Security for Costs will be required.

Where an uncertificated bankrupt sues as trustee for his assignees, and for their benefit, and not for the fruits of his own personal labour, he has been required to give security for costs;³ for, though it cannot be laid down as a general rule, that an uncertificated bankrupt must in all cases give such security where an action is brought by him, yet it is held to be but fair, if the action is really brought for the benefit of the assignees, that *they* should be responsible for the costs. Accordingly, in one case of this kind, where the defendant obtained a verdict against the bankrupt, the court of Common Pleas refused to grant the plaintiff a new trial, unless the assignees consented to be bound by the event of the action, and to be responsible for the costs.⁴

But where a joint action was brought by a bankrupt and another person, (who was a prisoner in Newgate,) the court of Common Pleas refused in this case to require such security, though the judgment of the court here seemed to proceed upon the consideration of the circumstance of the imprisonment of one of the plaintiffs,⁵ rather than in respect of the bankruptcy of the other. And, indeed, a rule for security for costs will not in general be granted, merely on account of the *poverty or insolvency* of a plaintiff;⁶ for, where an uncertificated bankrupt brings an action for *his own benefit*—as to recover the produce of his earnings since the

¹ Ex parte *Poucher*, 1 G. & J. 385. Ex parte *Parkinson*, *ibid.* 386, note (a.) and see ante, 297, 645.

² *West v. Pryce*, 2 Bing. 455.

³ *Webb v. Ward*, 7 T. R. 296.

⁴ *Noble v. Adams*, 7 Taunt. 59.

⁵ Anon. 2 Taunt. 61.

⁶ *Goodright dem. Jones v. Thrustout*, Cas. Pr. C. P. 15. Willock, 443. *Field q. t. v. Carron*, 2 H. B. 27. Cowp. 24. 2 Dick. Ch. Cas. 765.

bankruptcy—such security will not be required.¹ So, where in a joint action it appeared that one of the plaintiffs was a foreigner residing abroad, and the other a bankrupt in execution for debt,—the court refused to require them to find security for the costs, one of the plaintiffs being within the jurisdiction of the court, and within reach of its process, and not coming under any of the rules requiring such security to be given.²

Where a defendant is entitled to require security for costs, he should in the first instance, and before any motion is made to the court upon the subject, apply for it to the plaintiff's attorney; for until the latter has *refused* to give it—although the court may grant a rule to show cause why the plaintiff should not find such security—they will not, at any rate, make it a part of the rule that the proceedings shall be in the mean time stayed; for the rule might otherwise be often obtained merely for the purpose of delay.³ The defendant, also, must put in bail previous to his application for the rule. But where a foreigner resident abroad sued two defendants, and only one of them put in bail, that one was permitted to require the plaintiff to give security for costs, without putting in bail for the other defendant.⁴

The general rule is, that the application for security should be made, as soon as the defendant can reasonably do it after his knowledge of the fact on which he founds his application. Therefore, where the defendant might have applied earlier, the motion was holden too late, after issue had been joined and notice of trial given. And a similar motion was also refused, where the defendant had obtained time to plead, and agreed to take short notice of trial,—the court being of opinion, that he had thereby waived his opportunity of making the application, which must at that period necessarily delay the plaintiff.⁵

Where after action brought, and before plea pleaded, the plaintiff became bankrupt, and the defendant obtained an order for security for costs, and subsequently pleaded the plaintiff's bankruptcy in bar,—the court held, that though they could not deprive the defendant for the benefit of that plea, yet as the order for security for costs would not have

¹ *Cohen v. Bell*, B. R. T. 44 Geo. 3. 1 Tidd, Pr. 468.

² *McConnell v. Johnson*, 1 East, 431.

³ *Cheap v. Popham*, 2 Smith's Rep. 661. 1 Tidd, 470.

⁴ *De la Preuve v. Duc de Biron*, 4 T. R. 697. *Carr v. Shaw*, 6 T. R. 496.

⁵ *Michel v. Parecki*, 2 H. B. 593.

been made, if the defendant had said that he meant to defeat the action by pleading the plaintiff's bankruptcy, the order was discharged, with costs to be paid by the defendant.¹

In equity, an application for security for costs will be too late after answer, or obtaining an order for time to answer; at least, if the plaintiff's residence abroad, or any other cause for the application, appear on the face of the bill, or were known to the defendant at the time of filing the bill.² The usual security for costs required of a plaintiff in equity amounts to 40*l.*; and the court will not, even under special circumstances, depart from the general rule in this respect.³

¹ *Minchin v. Hart*, 1 Chitt. 215.

jun. 396. 5 Ves. 261. 10 Ves. 287;

² 2 Ves. 24, 557. 1 Dick. Ch.

and see *Hullock*, 448.

Cas. 147. 2 Brown, 609; and see
14 Ves. 518. 3 Bro. 370. 1 Ves.

³ *Ogilvie v. Hearne*, 11 Ves. 598;
and see 2 Ves. 557.

CHAPTER XXIII.

OF THE SOLICITOR TO THE COMMISSION.

- SECT. 1. *Of his General Rights and Duties.*
2. *Of his Lien for Costs.*
3. *Of the Taxation of his Bill, and his Remedy for Payment of it.*
4. *Of Actions and other Proceedings by and against him.*
5. *Of his Liability for Misconduct, and herein of his General Liability.*
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SECTION I.

Of the General Rights and Duties of the Solicitor.

By the general order¹ made in pursuance of the 1 & 2 Will. 4, c. 56, it was ordered that every attorney and solicitor of any of the superior courts at Westminster, might be admitted in the court of bankruptcy, upon the production of a certificate from the proper officer, and upon filing his own affidavit of his being such attorney or solicitor, and of the date of his former admission, such affidavit to be sworn, if residing in London, or within ten miles thereof, before the court of review, and if residing elsewhere, before a master extraordinary in chancery. Upon being so admitted, the solicitor had his name enrolled at the registrar's office in Basinghall-street, on payment of a fee of 5s. And now, by the act 6 & 7 Vict. c. 73, s. 27, every person who shall have been duly admitted a solicitor of the high court of chancery is entitled, upon the production of his admission therein or an official certificate thereof, and that the same continues in force, to be admitted as a solicitor in the court of bankruptcy on signing the roll of that court, and is there-

¹ Jan. 12th, 1832, Rule iv., et seq. See vol. ii. 1 Dea. & C., Appendix, xxiii.

upon entitled to practise as a solicitor therein, in like manner as if he had been sworn in and admitted a solicitor of such court; and no additional fee is payable except those mentioned in the act. All solicitors so admitted, who reside in London, or within ten miles thereof, must enter in a book to be kept at the registrar's office, his name and place of abode, or some other proper place in London, Westminster, or Southwark, or within one mile of such office, where he may be served with notices, &c., in matters depending in the court of bankruptcy; and as often as he shall change his place of abode, he must make the like entry. All notices, summonses, orders, and rules, which do not require personal service, are to be deemed to be sufficiently served on the solicitor, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any solicitor neglects to make such entry, then the fixing up of any notice, or the copy of a summons, order, or rule, in the registrar's office is declared to be sufficient.

By the general rules and orders¹ of the 12th November, 1842, no attorney or solicitor can practise in any district court of bankruptcy, until he shall have been admitted and enrolled as an attorney or solicitor of the court of bankruptcy, in the manner prescribed by the above order of the 12th January, 1832.

The solicitor to the fiat is nominated by the majority of the assignees, exclusive of the official assignee, who cannot interfere in the appointment or removal of the solicitor.² He may also be removed by such majority, and in that case must deliver up the proceedings under the fiat to any other solicitor who may be appointed in his room; for he has no lien upon them (as he has upon other papers) for his costs.³ The solicitor is a minister of the court,⁴ and is bound so far to watch over the interests of the bankrupt's estate, as to protect it even against his own demands—that is, where other parties have *preferable* claims upon it. Thus, in the case of a separate fiat, it is his duty to attend to the interest of the separate creditors, and not to permit the joint debt of himself and his partners to be proved to the prejudice of those creditors.⁵ It is inconsistent with the duties, also, of the

¹ Rule i. See post, vol. ii.; and
³ M. D. & D., Appendix.

² Ex parte *Tomlinson*, 2 Rose, 66.
¹ & 2 Will. 4, c. 56, s. 23, and 5 &
 6 Vict. c. 122, s. 49.

³ Anon. 1 Rose, 207. Ex parte
Scruby, ibid. note (a). Ex parte
Shaw, Jacob, 272.

⁴ 6 Ves. 1.

⁵ Ex parte *Story*, Buck, 74.

solicitor to the fiat, to act as solicitor for the bankrupt,¹ or as assignee,² or that even his partner should be assignee;³ though it has been held to be no cause for annulling the fiat, that he is also assignee.⁴ He cannot act as banker to the estate;⁵ nor could he, under the old law, be a commissioner under the same commission to which he acted as solicitor.⁶ He is disqualified, also, from becoming a purchaser of any part of the bankrupt's property, even though the purchase is perfectly fair on his part, and he bids openly in the presence of different persons interested in the property.⁷

So—in order to prevent any abuse of the great power and influence which an attorney must generally possess over his client, and which might (if uncontrolled) enable a dishonourable practitioner to commit the grossest impositions—the courts will never give effect to any bond or security, which is given or entered into by a client to his attorney during the pendency of the cause or proceeding in which the attorney is retained. In such a case the security will be either set aside entirely—or, at any rate, be restricted in its operation to the amount of such fees, as may be found due to the attorney upon a regular taxation of his bill. The principle of these decisions is the policy of the law founded upon the safety and convenience of mankind, and is quite independent of all fraud in the particular transaction, according to the ordinary understanding of the term. An attorney, therefore, is not permitted to take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature.⁸ After a suit is *entirely at an end*, a client may then give his attorney a reward for services over and above his legal fees.⁹ But though there is no suit pending, he cannot take a mortgage from his client for securing *future costs*.¹⁰

¹ Ex parte *Ross*, 1 Rose, 263. Ex parte *Vaughan*, 14 Ves. 513; and see 6 Ves. 631, note, where Lord Eldon observed, that he always thought what Lord Thurlow said was very wise, that there is no case in which it is useful upon general principles, that the same solicitor should be employed on all sides; for that, though it may be a saving of expense, yet where property is to be brought to sale, to pay creditors, &c. great mischief is occasioned by it.

² Ex parte *Badcock*, Mont. & M. 231.

³ Ex parte *Rice*, Mont. 259.

⁴ 16 Ves. 166; but see 6 Ves. 4.

⁵ 6 Geo. 4, c. 16, s. 102.

⁶ Ex parte *Ward*, Sel. Ca. Ch. 46.

⁷ *Owen v. Foulkes*, 6 Ves. 630 (note). Ex parte *James*, 8 Ves. 337. Ex parte *Limood*. Ex parte *Churchill*, cited *ibid.* 343. Ex parte *Bennett*, 10 Ves. 381.

⁸ 2 Atk. 298. Cas. temp. Talbot, 115. 2 Ves. 549. 4 Bro. 350. 2 Ves. jun. 199; and see 7 Ves. 584, 3 Anstr. 769.

⁹ 2 Ves. 260. 2 At. 30.

¹⁰ *Jones v. Tripp*, 1 Jacob, 323.

In suing out a fiat against a bankrupt, the solicitor must be careful to observe the rules and regulations which have been at different times laid down by the court for his conduct in this respect;¹ otherwise the fiat will not only be annulled, but he himself will be made to pay the costs. By a general order of Lord Loughborough,² it is provided, that after the expiration of fourteen days from the date of a town commission, and twenty-eight days in the case of a country commission, the commission is supersedable for want of prosecution; and that the application for a new commission, which shall (in the course of the following day) be first made by any other attorney or solicitor than the one at whose instance the supersedable commission was issued, shall be preferred to an application for the same purpose by the attorney who sued out such supersedable commission. But by a subsequent order,³ any solicitor, who acts merely as *agent* for the attorney in suing out the first commission, is not prevented from applying for a new commission as *agent* for a different attorney, provided he indorses upon the affidavit his own name, and the name and place of residence of the person for whom he acts as *agent* in suing out such second commission. And by the same order, whenever any attorney sues out a commission as *agent* for another, he is required to make a similar indorsement.

Where an attorney is employed by one person to sue out a fiat on the petition of another person, the party employing the attorney, and not the petitioning creditor, is the person liable to the attorney for the costs of suing out the fiat.⁴

An attorney or solicitor cannot, as has been formerly observed,⁵ be made a bankrupt himself in his professional capacity; though he is liable (like any other person) to a commission of bankruptcy, if he acts in the character of a *scrivener*, or follows any other calling which the bankrupt law has denominated a trading.

The solicitor to the commission was the depositary of the commission and the proceedings; and he was bound to keep them in safe custody, until required by the assignees, or an order of the lord chancellor, to deliver them up to any other person; for (we have already seen⁶) he had no lien upon them, and if he refused to produce them when legally

¹ See ante, Ch. v., Sect. 1.

² 26th June, 1793.

³ 5th November, 1793.

⁴ *Pocock v. Russell*, 4 C. & P. 14. Mood. & M. 358.

⁵ Ante, 27.

⁶ Ante, 921.

required, costs would always be given against him.¹ But it seems that he had a lien upon the proceedings under a commission which had been *superseded*, and could not be compelled to deliver them until his costs were paid.² If served with a *subpoena duces tecum* to produce the proceedings in a collateral action, the better opinion seems to be that he was bound to do so,³ and that this was an obligation incumbent upon him as a public duty;⁴ though Lord Kenyon in one case held the contrary, saying that the proceedings belonged not to the solicitor but to the assignees.⁵ Conflicting opinions have also been expressed by different judges upon his liability to produce them when the production *might tend to the detriment of his clients the assignees*—Lord Chief Justice Abbott holding, that he was not compelled to do so⁶—whilst Lord Gifford, on the contrary, decided on one occasion that he was bound to produce certain books of the bankrupt, in order that entries relating to the matters in issue, but to them alone, might be read upon the trial—notwithstanding there was in this case a possibility of the assignees being prejudiced by the result of the verdict.⁷ It was incumbent upon the solicitor (when served with a *subpoena duces tecum*) to be ready to produce the proceedings, if ordered to do so by the court—though it was a question for the judge, whether he ought to be compelled;—for in case of disobedience without special cause, he was liable to an attachment, or an action for damages.⁸

Where a true bill for perjury was found against the solicitor, who had made an affidavit in opposition to a petition to supersede, and it was necessary to produce the commission and proceedings, as well as the affidavit, at the trial, the court ordered the solicitor to lodge them at the bankrupt office, for the purpose of being enrolled, and that some proper person should attend with them at the trial.⁹

With respect to other papers and documents deposited by a bankrupt with his solicitor, and which do not form any part of the proceedings under the commission—it has been held, that a solicitor is bound to produce such papers (for the purposes for which he received them) on behalf of the assign-

¹ *Ex parte Bullen*, 1 Rose, 134. *Ex parte Hardy*, *ibid.* 395. *Ex parte Titley*, 2 Rose, 83; and see *Ex parte Sandison*, 1 Rose, 275.

² *Ex parte Shaw*, 1 G. & J. 124. 1 Jac. 270.

³ *Cohen v. Templar*, 2 Star. 260, per Holroyd, J.

⁴ *Pearson v. Fletcher*, 5 Esp. 90, per Lord Ellenborough.

⁵ *Bateson v. Hartsink*, 4 Esp. 43.

⁶ *Laing v. Barclay*, 3 Star. 38.

⁷ *Hawkins v. Howard*, 1 Ryan & M. 64. 1 C. & P. 222; and see *Corsen v. Dubois*, 1 Holt, 239.

⁸ 1 Holt, 239. 1 Phill. 471.

⁹ *Ex parte Tipton*, Mont. 214.

nees, though he is not employed by them in the cause; but he is not bound to deliver them up, or even to produce them in *any other business*, without payment of his bill.¹ And where a solicitor has *no lien* on such papers deposited with him by a bankrupt, the court will, on petition, order them to be delivered up to the assignees (if necessary) for the administration of the estate; though such an application was refused, where the assignees wanted them for the purpose of instituting criminal proceedings against the bankrupt.² A solicitor, also, who is not the bankrupt's solicitor, but who has in his custody a deed executed by the bankrupt, is bound to produce it if required by the commissioners, like any other witness upon a *subpoena duces tecum*—without prejudice, however, to any legal objection he may have to disclose circumstances relating to the deed, on the ground of confidential communication.³

So the solicitor of a purchaser of an estate from the bankrupt is bound to attend the commissioners for the purpose of being examined, without prejudice to any question of privilege.⁴

An attorney is, in general, privileged from arrest by process issuing out of *his own court*; and if arrested, may move to be discharged on common bail.⁵ But if he is arrested by process out of a *different court*, he must then find special bail, and plead his privilege in abatement.⁶ And where a solicitor was arrested by a *clerk in court*, and applied to the lord chancellor for an injunction to stay the proceedings, and for an order that the bail-bond should be cancelled,—Lord Eldon said, that by granting such a motion, he should take away the authority and privileges of the ancient officers of the court.⁷ But a solicitor, as well in bankruptcy as in the course of other judicial proceedings, is privileged from arrest in going to or returning from the court to which his duty to his client calls him; therefore, where a solicitor was arrested on his way to Lincoln's Inn Hall to attend the hearing of a petition in the lord chancellor's paper, he was ordered to be⁸ discharged on motion—Lord Eldon upon this

¹ *Ross v. Laughton*, 1 Ves. & B. 349.

² *Ex parte Innes*, Buck, 337.

³ *Ex parte Treacher*, Buck, 17; and see 1 Holt's Rep. 239.

⁴ *Ex parte Hodgson*, 2 G. & J. 21.

⁵ 1 Mod. 10. 2 Salk. 544. 1 Wils. 298.

⁶ 2 Salk. 544. 2 Str. 864. 2 Ld. R. 1567. 1 Wils. 306.

⁷ *Smith v. Wainwright*, Sitting after Michaelmas term, 1826.

⁸ *Castle's case*, 16 Ves. 412. The application in such a case must be entitled *in the bankruptcy*.

occasion examining the party himself, and the oath being administered by the registrar. And the same order was made where the solicitor was arrested on his return from Lincoln's Inn Hall.¹

When a fiat is suspicious in the circumstances of the issuing of it, the court will expect the solicitor to give an account of his conduct, and to explain those circumstances.²

As no person but the petitioning creditor himself could enter into the bond to the lord chancellor upon issuing the commission, a solicitor was therefore refused permission to give the bond for a petitioning creditor who was an *infant*.³

The solicitor, under the old law, was bound to pay the fees of the commissioners if they were summoned to attend, whether there were assets sufficient for that purpose or not; and if he refused, the commissioners might petition against him.⁴ So he was liable to the messenger for his costs, and for any damages sustained by him when the commission was superseded for fraud, and the petitioning creditor had absconded.⁵ In like manner, where the solicitor was employed by the petitioning creditor to work the commission for a sum certain, and had received a great part of that sum, he was held liable to the payment of the messenger's bill.⁶ But, in general, the solicitor is not to be regarded as a principal, though he is the *medium* through which it is convenient that the messenger should receive his fees;⁷ for the petitioning creditor, and not the solicitor, is liable to the messenger in the first instance, unless the solicitor has made himself responsible by special agreement.⁸

A clerk to a solicitor commencing practice for himself is not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master.⁹

The solicitor employed to present a petition to stay the bankrupt's certificate, ought not to withdraw it without leave of the court.¹⁰

¹ *Gascoyne's case*, 14 Ves. 183.

² *Ex parte Stevens*, 6 Ves. 2. 19 Ves. 539.

³ *Ex parte Barrow*, 3 Ves. 554.

⁴ *Ex parte Griffith*, 2 Rose, 642.

⁵ *Mad.* 56.

⁶ *Ex parte Hartop*, 9 Ves. 109. 12 Ves. 349.

⁶ *Hartop v. Jukes*, 2 M. & S. 438.

⁷ 2 M. & S. 438.

⁸ *Hart v. White*, 1 Holt, 376. *Hart v. Biggs*, *ibid.* 245. *Ex parte Burwood*, 2 G. & J. 70.

⁹ *Brichenov. Thorp.* 1 Jacob, 300.

¹⁰ *Ex parte Gibson*, 6 Ves. 5.

SECTION II.

Of his Lien for Costs.

Though an attorney or solicitor had not, as we have already seen,¹ any lien upon the commission or the proceedings under it (whilst the commission was in existence) for his costs, yet he has a general lien upon all *other* deeds and papers of the bankrupt, which came into his hands *before* the bankruptcy—but not for those received *after* the bankruptcy;—and he has the same lien, also, against the assignees as against the bankrupt.² This lien is held to attach, not only in respect of his bill for business done before his bankruptcy, but for the costs of an action brought by him against the bankrupt (even subsequently to the issuing of the commission) in order to recover the amount of his bill.³ And if the attorney dies, his lien is not extinguished, but goes to his personal representative; for the court will not order his executor to deliver up the deeds or papers, until security has been given that his lien will be discharged.⁴

But the lien of an attorney (on papers and proceedings in an action or suit in which his client is concerned) only extends to the amount of his costs and charges in that particular action or suit, and not to any demand he may have against his client in respect of *other* actions or suits.⁵ And if papers are deposited with an attorney for a particular purpose, then they are exonerated from his general lien; but the purpose of the deposit must appear by special agreement.⁶

So, the *agent* of a country attorney (who becomes bankrupt) has a lien upon papers in his hands for the amount of his agency fees,—which lien, it seems, is not defeated by his proving his debt under the commission.⁷ He has not, however, a *general* lien upon the papers in a cause, but only a *special* lien for the amount of money actually due to him from the country attorney for business done in that *particular* cause; and—as against the client or party in the cause—not

¹ Ante, 921.

² *Mitchell v. Oldfield*, 4 T. R. 123. Ex parte *Bush*, 7 Vin. Ab. 74. Ex parte *Bell*, 1 C. B. L. 429. Ex parte *Pemberton*, 18 Ves. 282. *Stevenson v. Blakelock*, 1 M. & S. 535. Ex parte *Lee*, 2 Ves. jun. 285. *Park v. Carter*, 1 C. B. L. 429.

³ *Lambert v. Buckmaster*, 2 B. & C. 616.

⁴ *Redfearn v. Souerby*, 1 Swanst. 84. 1 Wils. 96.

⁵ *Lann v. Church*, 4 Mad. 391. *Bray v. Hine*, 6 Pri. 203.

⁶ Ex parte *Stirling*, 16 Ves. 258.

⁷ Ex parte *Steele*, 16 Ves. 164.

beyond the extent also of the balance due from the client to the country attorney.¹

If the attorney take any security for payment of his bill, such as a bond or promissory note—or enter into any *special* contract or agreement for the payment of it,—his lien, in either of these cases, is held to be abandoned;² for it is a maxim adopted from the civil law, that a party entitled to a lien, by taking security for his demand, waives that right—the *special* contract in this instance superseding the *implied* one. And where a solicitor had obtained an order to have his bill taxed, and to prove for the amount, he was held by the vice-chancellor to have waived his lien upon papers belonging to the bankrupt.³ But where an attorney had taken acceptances for the amount of his balance *before* a lease came to his hands, and some of which acceptances had also before then been dishonoured, and one taken up by himself,—the court of King's Bench distinguished this case from that of *Cornell v. Simpson*, and held that his lien was not extinguished.⁴

And though an attorney has a lien on deeds in his hands belonging to his client, yet he has no right to sell the property to which they relate in satisfaction of his lien, without the consent of the owner. Therefore, where an attorney had a lien for 300*l.* on a lease in his hands belonging to a client, against whom a commission of bankruptcy issued in December, 1829, the attorney acting as solicitor under the commission; and in 1831, after notice of a petition to supersede it, he joined with the assignees in a sale of the lease, and out of the proceeds was paid the 300*l.* due to him from S., and in 1832, the commission having been superseded for want of a sufficient petitioning creditor's debt, a fiat in bankruptcy was subsequently issued; it was held that the attorney was liable to refund the 300*l.* in an action for money had and received to the use of the assignees under the fiat, and also the money he had received for the accruing rent.⁵

The lien of an attorney, on deeds and papers in his possession, is confined to the deeds strictly belonging to his client—except, indeed, those which he has himself prepared.⁶

¹ *Bray v. Hine*, 6 Pri. 203. Anon. 2 Dick. 802. 15 Ves. 297. *Chapman v. Clarke*, *ibid.* *Farewell v. Cocker*, 2 P. Wms. 460.

² *Cornell v. Simpson*, 16 Ves. 275; and see 1 Turn. 91, per Lord Eldon.

³ *Ex parte Hornby*, Buck, 351; but see *ex parte Steele*, 16 Ves. 164. *Ex parte Hunter*, Buck, 556.

⁴ *Stevenson v. Blakelock*, 1 M. & S. 535.

⁵ *Clark v. Gilbert*, 2 Bing. N. C. 343. 2 Scott, 520.

⁶ *Hollis v. Claridge*, 4 Taunt. 807.

Therefore, if a tenant for life put the deeds of the life estate into his attorney's hands, and dies,—the attorney has no lien upon them as against the remainderman.¹

So, where deeds not prepared by an attorney come by accident into his hands (even through the medium of his own client), the attorney has not a lien upon them, as against the other party to the deeds, for the amount of his demand against his client.² Neither has an attorney any lien upon the *will* of his client,³ nor upon documents, which he obtained possession of, not in his character of attorney, but in that of steward of a manor.⁴

An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, but also the drafts and copies.⁵

The lien of an attorney attaches upon *money* in his hands belonging to his client, as well as to deeds and papers. Therefore, if money be recovered in an action, he may stop it *in transitu*, or apply to the court to prevent its being paid over until his own demand is satisfied⁶—upon the principle (as Lord Kenyon formerly observed) that the party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained.⁷ Therefore, if a defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs.⁸ So, if a solicitor prosecute to a decree, he has a lien on an estate recovered, as against the person recovering, for his bill; but not as against the estate in the hands of the *heir*, unless it should be necessary to have the suit revived; and, in that case, the lien will revive too.⁹ An attorney has also a lien for his bill upon money levied under an execution upon a judgment recovered against his client; and, on motion, the court will grant a rule upon the sheriff to pay it over to him, notwithstanding a docket has been struck against the plaintiff on an act of bank-

¹ *Ex parte Nesbitt*, 2 Sch. & Lef. 279; and see *Hoare v. Parker*, 2 T. R. 376. *Bishop v. Huggins*, 2 Barnes, 38.

² *Esdaile v. Oxenham*, 3 B. & C. 225.

³ *Georges v. Georges*, 18 Ves. 294. *Belch v. Symes*, 1 Turn. 87.

⁴ *Champernown v. Scott*, 6 Mad. 93.

⁵ *Ex parte Horsfall*, 7 B. & C. 528.

⁶ *Tidd's Prac.* 329. Barnes, 145.

⁷ *Read v. Dupper*, 6 T. R. 361.

⁸ *Taunt.* 341.

⁹ 6 T. R. 361.

⁹ *Ambl.* 102.

ruptcy since the judgment.¹ So, an attorney has a lien upon a sum *awarded* in favour of his client,² as well as if it was recovered by judgment.

Where costs were ordered to be paid by a petitioning creditor to a bankrupt upon the commission being superseded, the bankrupt's solicitor was held to have a lien upon the costs for the expense of superseding the commission;³ and, indeed, where any costs are ordered to be paid to a party to a petition, the solicitor of the party has a lien upon those costs for his own charges, although there be no fund in court to pay them; neither can the client, in such a case, release the benefit of the order to the prejudice of the solicitor.⁴ But it has been determined that his lien on a *fund decreed* to his client is (like his lien upon papers in a cause) not a *general lien*; and that he can only claim to be reimbursed out of such fund the costs in *that particular suit*, and not his demand for costs incurred in other suits.⁵

So, where a solicitor was employed by the trustees under a trust-deed in the preparation of the deed, and the execution of the trusts, and the trustees were afterwards chosen assignees under a subsequent fiat against the party who had assigned his effects under the trust-deed; it was held that the solicitor could not retain a sum which had come to his hands since the bankruptcy, in satisfaction of his charges relating to the trust-deed.⁶

And where a solicitor, without the authority of the assignees, gave an undertaking to a sheriff's officer, who had seized the bankrupt's goods in execution, to indemnify him against the consequences of his relinquishing the possession of the goods; it was held that he had not, by reason of his liability on this undertaking, any lien upon the bankrupt's money in his hands.⁷

So an *agent* in London for a country attorney has only a lien on the damages and costs recovered in an action, to the amount of what is due to him *as agent* in the particular cause, and not to the extent of what would have been the amount of the country attorney's costs.⁸

¹ *Griffin v. Eyles*, 1 H. B. 122.

² *Ormerod v. Tate*, 1 East, 464; and see *Gifford v. Gifford*, Forest's Rep. 109.

³ *Ex parte Castle*, 15 Ves. 539.

⁴ *Ex parte Rhodes*, 15 Ves. 542. *Ex parte Bryant*, 2 Rose, 237. 2 Ves. 25.

⁵ *Laun v. Church*, 4 Mad. 391.

⁶ *Ex parte Dean*, 2 M. D. & D. 438.

⁷ *Ex parte White*, 2 M. D. & D. 436.

⁸ *White v. Royal Exchange Assurance*, 1 Bing. 20. *Ward v. Kepple*, 15 Ves. 297. *Moody v. Spencer*, 2 Dow. & R. 6.

Where a solicitor, however, declines to act any further for a client, on the ground of the refusal of the latter to follow his advice, he has, in this case, no lien for his costs upon a *fund in court*; for whatever may be his reasons for declining to proceed, a solicitor can only claim a lien on a fund of this description, when he carries the business through to a hearing.¹

And the lien of the attorney for his costs is held in no case to interfere with the personal liberty of the other party to the suit, nor to extend to a lien on the defendant's body;² as, where a plaintiff after judgment settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record, the defendant was considered entitled to be discharged out of custody, though the lien of the plaintiff's attorney for his costs had not been satisfied.³

Whenever an attorney calls on the court to interfere summarily against a party, who has deprived him of his costs by entering satisfaction on record, he must make it distinctly appear that everything on *his part* has been rightly done. If he has not, therefore, a regular authority from the plaintiff for the commencement of an action, the court will not interfere in his behalf, by ordering the entry of satisfaction to be vacated.⁴

SECTION III.

Of the Taxation⁵ of the Solicitor's Bill of Costs, and his Remedy for the Payment of it.

Every bill of costs of the solicitor or messenger under any fiat, incurred prior to any sitting for an audit, must be delivered for taxation five days at least before the day appointed for such sitting; in default whereof the solicitor or messenger must pay the costs of any adjournment of such sitting, the amount of which are to be deducted from the amount of the bill. No money can be paid to any solicitor or messenger on account of any charges in a bill, until the bill shall have been taxed.⁶

It has been before observed, that the costs of prosecuting the

¹ *Cresswell v. Byron*, 14 Ves. 271.

² *Pyne v. Erle*, 8 T. R. 407.

³ *Marr v. Smith*, 4 B. & A. 466.

Martin v. Francis, 2 B. & A. 402.

⁴ *Abbott v. Rice*, 3 Bing. 134.

⁵ See 6 & 7 Vict. c. 73, s. 37, et seq.; and 7 & 8 Vict. c. 96, s. 45, post, vol. ii.

⁶ General Order of 12th Nov. 1842, Rule 15, vol. ii. & 3 M. D. & D. App. lvii.

fiat up to the choice of assignees are to be taxed and ascertained by the commissioner at the meeting for that purpose; and that if any party is dissatisfied with their taxation, the bill may, upon reasonable objection shown, be referred for taxation¹—and this even though the amount of the bill has been allowed in the accounts of the assignees,² or has even been paid by the bankrupt upon superseding the commission.³ And creditors may petition to tax the solicitor's bill, though paid, where the assignees have neglected to file the bills with the proceedings.⁴ An assignee also is not estopped from applying for an order of taxation, by having joined his co-assignees in the payment of the bill, pursuant to the order of the commissioners.⁵ But where nearly six years had elapsed since the bill had been taxed by the commissioners, and the assignee was a party to the taxation, and to the subsequent payments in discharge of the bill, the court refused his application to refer it for re-taxation.⁶ The enactment⁷ has been also noticed, by which all subsequent costs are now made taxable by the commissioner in the first instance.⁸

Some doubts were formerly entertained, whether the lord chancellor could order the taxation of a bill in bankruptcy, where there was no commission subsisting—as in a case, where the application is made to tax a bill after the commission was superseded.⁹ But it seems that the general jurisdiction of the lord chancellor over solicitors, as officers of the court, gave him sufficient authority to make any order that he thought fit respecting the taxation of a solicitor's bill;¹⁰ and the same principle applies to the power of the court of review.¹¹ And the 6 & 7 Vict. c. 73, s. 37, expressly empowers and requires the lord chancellor to refer for taxation any bill of costs of business transacted in any matter of bankruptcy. And where a docket has been struck, though no commission is sealed, the lord chancellor has, upon petition, referred the bill to be taxed.¹²

By the 3 & 4 Will. 4, c. 47, s. 8, all costs between party and party in the court of review are taxable by one of the

¹ Ante, 902; and see 7 & 8 Vict. c. 96, s. 45.

² Ex parte *Gregson*, 3 Mad. 49; and see ex parte *Woolston*, 3 M. D. & D. 702.

³ Ex parte *Hayden*, 2 G. & J. 52.

⁴ Ex parte *Castle*, 1 M. & A. 665.

⁵ Ex parte *Fosbrooke*, 3 Dea. 686.

⁶ Ex parte *Hutchinson*, 3 D. & C. 829.

⁷ 6 Geo. 4, c. 16, s. 14.

⁸ Ante, 904; but now see 7 & 8 Vict. c. 96, s. 45.

⁹ Ex parte *Parker*, 1 C. B. L. 12. Ex parte *Aldridge*, *ibid*.

¹⁰ Ex parte *Earl of Uxbridge*, 6 Ves. 425. Ex parte *Arroucsmith*, 13 Ves. 124.

¹¹ Ex parte *Copeland*, 4 D. & C. 86.

¹² Ex parte *Smith*, 5 Ves. 706.

registrars or deputy registrars of the court; and by 7 & 8 Vict. c. 96, s. 45, the lord chancellor is empowered to appoint a taxing officer, to be called the master of the court of bankruptcy, to perform these duties.

Where charges in a solicitor's bill up to the choice of assignees are *prima facie* exorbitant, it is of course to refer it for taxation, notwithstanding it may have been paid, and the assignee may be dead who paid it.¹ But after a bill has been paid, the objectionable items should be stated, in order to have it taxed,² unless the bill amounts to more than 100l.³ The order for taxing such a bill may be drawn up, even upon an *ex parte* application, and if the solicitor wishes to modify or discharge the order, he must apply to the court for that purpose.⁴ But the court of review in one case decided that the petition ought to be served upon the solicitor.⁵ Any creditor, also, may apply for the order, if there has been neglect on the part of the assignees,⁶ and he need not state in his petition items to which he objects.⁷ An assignee, also, though he is not a creditor, may make the application,⁸ or one of three petitioning creditors, without the others joining with him in the application.⁹

In case of a deficiency of assets, the petitioning creditor (we have seen), and not the assignees, is personally liable to the solicitor for his bill up to the choice of assignees;¹⁰ and the payment of it may be enforced by petition to the court of review.¹¹

Where the solicitor (employed by the petitioning creditor to sue out the fiat) is continued by the assignees, and, having delivered his bill including all charges both before and after the choice, receives a certain sum on account of his bill generally from the assignees, he is bound to appropriate it (in his account with the petitioning creditor) in reduction of his claims upon him for his costs before the choice of assignees.¹² Where the amount of such costs, therefore, is covered by the sum so received, it cannot be set off by the solicitor against a debt due from him to the petitioning creditor on his own account.

A solicitor having persuaded a petitioning creditor to

¹ *Ex parte Neale*, Buck, 111. *Ex parte Emery*, *ibid.* 422. *Ex parte Hayden*, 2 G. & J. 52.

² *Ex parte Beraford*, 2 G. & J. 259.

³ *Ex parte Brereton*, 4 Mad. 479. *Ex parte Emery*, Buck, 422.

⁴ *Ex parte Hewitt*, Buck, 388.

⁵ *Ex parte Griffith*, 1 D. & C. 41. Mont. 517.

⁶ *Ex parte Walker*, 1 G. & J. 95.

⁷ *Ex parte Key*, Mont. 133.

⁸ *Ex parte Barlow*, Mont. 87.

⁹ *Ex parte Watts*, 1 Dea. 588.

¹⁰ *Ex parte Haynes*, 1 G. & J. 35.

¹¹ *Ex parte Coates*, 3 Dea. 626.

¹² *Philips v. Dica*, 15 East, 248.

strike a docket, upon the solicitor undertaking to prove the act of bankruptcy, and to guarantee the petitioning creditor from the expenses of issuing the commission, an order was refused for taxing the solicitor's bill; for both he and the petitioning creditor were, in this case, considered to be guilty of a contempt of the great seal.¹

Where a solicitor carries on suits in equity for an assignee, without the authority of the majority in value of the bankrupt's creditors present at a meeting summoned for that purpose, he has no claim against the estate of the bankrupt for his bill in respect of such suits, though he has a personal remedy against the assignee who employed him.² And the court will not countenance the employment of more than *one* solicitor under the fiat.³ And where a solicitor (who was not the solicitor to the commission) was employed by joint creditors under a separate commission to conduct examinations, &c. before the commissioners, the lord chancellor refused to make any order for the payment of his charge out of the joint effects.⁴

Where a solicitor sues out a fiat against a bankrupt upon a debt due to himself for costs, any creditor in this case may have the bill of costs taxed, if the bankrupt himself at the time of his bankruptcy was not concluded.⁵

A solicitor, who has been engaged in carrying on legal proceedings for the bankrupt, cannot charge his estate with the costs incurred subsequent to the commission of the act of bankruptcy. A debt, therefore, composed of such costs is not a good petitioning creditor's debt.⁶ A sum of 44*l.* for expenses incurred in endeavours to apprehend a bankrupt who had absconded, was held by the lord chancellor to be reasonable.⁷

With respect to other matters not occurring in bankruptcy, it is a matter of course to order the bill of an attorney or solicitor to be taxed before a judgment is obtained against the party to be charged with it; which order must be *personally* served upon the solicitor, unless a special order is obtained to dispense with such service. But by 6 & 7 Vict. c. 73, s. 37, no reference for taxation is to be directed upon the application of the party chargeable with the bill of costs,

¹ *Ex parte Wilson*, Buck, 306.

⁵ *Ex parte Prideaux*, 1 G. & J.

² *Ex parte Whitchurch*, 1 Atk. 28.

⁶ *Ex parte Miller*, Buck, 286.

³ *Ex parte Turner*, 3 M. D. & D. 523.

⁷ *Ex parte De Tastet*, 2 G. & J. 403.

⁴ *Ex parte Longman*, 1 Rose, 303.

after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of the solicitor, or after the expiration of twelve months after the bill has been delivered, except under special circumstances, to be proved. Therefore, if a party, who may have the bill previously taxed, waive that advantage, and let the cause go to a jury, either by pleading, or on a judgment by default, he cannot afterwards resort to the taxation by the officer of the court.

Where, also, an account has been *settled* between an attorney and his client, the court will not, in general, refer a bill for taxation, unless error, fraud, or other circumstances, be disclosed by affidavit;¹ in which case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from having the bill taxed.² But where a bond was given for the amount of an attorney's bill five years before, and all the vouchers were delivered up³—or where a bill has been settled and paid several years, and a receipt in full given,⁴—the court, in each of these cases (there being no evidence of fraud), refused to refer the bill to be taxed. Where, however, the circumstances are suspicious, and the client has inadvertently given a bond or mortgage to secure the payment of what was charged to be due to him on account of fees, &c., courts of equity have in some cases relieved the client, and ordered the bill to be taxed;⁵ and this even after the lapse of a considerable number of years.⁶ So the settlement of a solicitor's bill pending a cause is not, as between other persons, conclusive; for while the suit is pending, the client is in a degree under the control of the solicitor; and such a settlement does not therefore bar a taxation.⁷ Neither can it be made one of the terms of the compromise of a suit, that the solicitor's bill shall be paid without taxation.⁸

Before the 6 & 7 Vict. c. 78, passed, if the *whole* of an

¹ *Hooper v. Till*, Doug. 198. *Clarke v. Taylor*, Cas. Pr. C. P. 118. *Prac. Reg.* 38. *Barnes*, 124. *Longstaffe v. Taylor*, 14 Ves. 262. *Bennet v. Hart*, Say, 323. *Draper's Company v. Davis*, 2 Atk. 295. *Hullock*, 501, et seq.

² *Say*, 323. *Doug.* 199; and see 2 Atk. 295.

³ *March v. Carter*, Cas. Prac. C. P. 109. *Prac. Reg.* 37.

⁴ *Pistor v. Dunbar*, 1 Anstr. 186. As to all these points, see

Waters v. Taylor, 2 M. & Cr. 527; *Horlock v. Smith*, *ibid.* 495; and *ex parte Woolston*, 3 M. D. & D. 705.

⁵ Per Lord Hardwicke, 2 Atk. 29, 30. Per Lord Camden, 1 Dick. 403. 14 Ves. 263; and see *ante*, 727. And see *Balme v. Paver*, 1 Jacob, 305.

⁶ *Leues v. Morgan*, 5 Pri. 42.

⁷ *Crossley v. Parker*, 1 Jac. & W. 460.

⁸ *Balme v. Paver*, 1 Jacob, 307.

attorney's bill was for *conveyancing* business, it could not be taxed;¹ but if the bill was in *part* for business done in court, and the rest for business of another nature, the *whole* bill then was liable to taxation,² even though the *smallest item* was for business done in court.³ Charges, also, for holding the courts of a manor by an attorney, as the steward of the court, were charges for business connected with his professional character, (like those for conveyancing,) and were, therefore, taxable when found in a bill containing other taxable items.⁴ And whenever an action was commenced in any court upon an attorney's bill, that court (being thereby possessed of the cause) had a power to refer such bill for taxation, although no one *item* in it was for business transacted in that *particular court*.⁵ It seems that any court has a paramount jurisdiction, independent of the statutes on this subject, to refer the bill of any attorney or solicitor of that particular court to be taxed.

And now by the 6 & 7 Vict. c. 73, s. 37, in case the bill be for business, no part of which has been transacted in any court, the lord chancellor or the master of the rolls may refer it for taxation on the application of the party chargeable therewith, without any money being brought into court. If an attorney deliver two separate bills together, one of which is for fees and disbursements in causes, and the other for conveyancing, the court in such a case has ordered both bills to be taxed.⁶ A bill, also, for business done *entirely* at the quarter sessions,⁷ or in a criminal suit in the court of great sessions in Wales,⁸ will, upon application, be referred to be taxed. And the charge for preparing an affidavit of debt and getting it sworn⁹—the preparing a warrant of attorney,¹⁰ even though it is never¹¹ executed—the filling up a bail bond¹²—and the suing out a *dedimus potestatem*,¹³ were, before the passing of the last-mentioned act, held to be each of them sufficient *items* to enable the court to refer

¹ *Hillier v. James*, Barnes, 41. B. N. P. 145.

² 11 East, 286. Anon. Doug. 199, note. *Margerum v. Sandiford*, 3 Bro. 233.

³ *Winter v. Payne*, 6 T. R. 45. Ex parte *Prickett*, 1 N. R. 266. 2 B. & P. 343, per Lord Eldon.

⁴ *Luzmore v. Lethbridge*, 5 B. & A. 898.

⁵ *Evans v. Bevis*, 2 Barnard, 182. *Gregg's case*, Salk. 89, contra.

⁶ *Green v. Hassel*, Say. Rep. 233.

⁷ Ex parte *Williams*, 4 T. R. 496. *Clarke v. Donagan*, 5 T. R. 694. 1 Esp. 137.

⁸ *Lloyd v. Masind*, 1 Tidd, 315, note.

⁹ 6 T. R. 645.

¹⁰ *Wilson v. Gutheridge*, 3 B. & C. 157. *Sandom v. Bourne*, 4 Camp. 68.

¹¹ *Wild v. Crawford*, 2 Star. 538.

¹² *Fearne v. Wilson*, 6 B. & C. 86.

¹³ 1 N. R. 266.

the whole bill for taxation. An attorney's bill may likewise be taxed after his death, notwithstanding the amount is then due to his executor.¹

But a solicitor's bill of fees *wholly* made up of charges for prosecuting an appeal from the court of Chancery in Ireland to the House of Lords, was held by the court of Exchequer not capable of taxation—there being no criterion by which their own officer could tax the bill, or any means to which he could resort for assistance.² So, a charge for preparing an affidavit of the petitioning creditor's debt and bond to the lord chancellor, in order to obtain a commission of bankruptcy, was held not a taxable item in an attorney's bill within the 2 Geo. 2, c. 23, s. 23, (now repealed by the 6 & 7 Vict. c. 73,) as being a charge neither at law nor in equity, where the affidavit had not been sworn, nor a commission issued.³ For the same reason, a solicitor's bill in respect of business transacted in the affairs of a charitable foundation, though the office of visitor was exercised by the lord chancellor, was held not liable to taxation; for this also was considered not a proceeding either in law or equity; as it is not in the *court* of Chancery that the visitatorial power is to be exercised.⁴

An attorney's bill, which is not *signed* by him, or his partner, executor, administrator, or assignee, cannot be taxed under the statute.⁵ Before the 6 & 7 Vict. c. 73, where a party agreed to pay a solicitor's bill on a third person, he could not apply to have it taxed; for the 2 Geo. 2, c. 23, applied only to cases between solicitor and client. But now by the 38th section of the last-mentioned act, where any person, not being the party chargeable with the bill, within the meaning of the former section of the act, is liable to pay or has paid the bill, either to the solicitor or his personal representative or assignee, or to the party chargeable with the bill, such person may apply to have the bill taxed. Where the attorney makes a *special agreement* with his client to be paid a *certain sum*, or at a *certain rate*, for his time and trouble,—it seems doubtful whether, under these circumstances, the bill can be referred to be taxed; in one case⁶ of this kind the court said they could do nothing in it; while in another⁷ it was holden, that the client should not be concluded by any agreement of this description.

¹ *Person v. Johnson*, 4 Taunt. 724; and see 6 & 7 Vict. c. 73, s. 37.

² *Williams v. Odell*, 4 Pri. 279.

³ *Burton v. Chatterton*, 3 B. & A. 486.

⁴ *Ex parte Dann*, 9 Ves. 547.

⁵ *Cas. Pr. C. P.* 60, and 6 & 7

Vict. c. 73, s. 37.

⁶ *Anon.* 2 Barnard, 164.

⁷ *Anon.* 2 Say. 321.

The bill of an *agent* to a country attorney may be referred to be taxed, upon the country attorney bringing the amount of the whole demand into court.¹ But the application to tax it must be made by the country attorney, and not by the client.²

If an attorney refuse to deliver a bill signed to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney (on service thereof) do not attend, an order will be made to deliver it within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; after duly serving which, and making affidavit of the service, the court will, on motion, grant an attachment. When the bill is delivered, the client may then apply for a judge's order to show cause why it should not be referred to the proper officer; upon which an order will be made, on the client's undertaking to pay the attorney what shall appear to be due to him upon such taxation.³ But a client cannot have a summons for the delivery of the bill, and for taxing it, at the same time.⁴ If the attorney do not attend the first appointment on the summons, an order will be made of course.⁵

After an attorney's bill has been once taxed by the proper officer of the court in which the business was done, it cannot be taxed a second time by the officer of any other court.⁶ Nor will a court of equity entertain cognizance of a bill for an account filed by the attorney, suggesting that improper deductions were made by the officer upon the taxation, and praying that the defendants might come to a fair account with the plaintiff for the monies due to him.⁷ After the taxation of the bill, also, the client cannot have an antecedent demand on the solicitor deducted out of what was taxed due to the solicitor upon such bill; for, by applying to have the bill taxed, the party submits to pay what shall be actually found due thereon.⁸

The delivery of a former bill by an attorney is conclusive evidence against an increase of charge in a subsequent bill, on any of the *items* contained in it, and also strong presumptive evidence against any additional *items*—unless any errors, or real omissions, can be shown in the former bill.⁹

¹ *Dixon v. Plant*, Doug. 199, n. Ex parte *Bearcroft*, *ibid.* 200, note. *Groome v. Symonds*, 1 Tidd, 281. Contra, *Anon.* 2 Wils. 266; and see 1 Dick. 112, 285.

² *Wildbore v. Bryan*, 8 Pri. 679.

³ 1 Tidd, 318.

⁴ *Cooper v. Milburn*, 1 Barnes, 102.

⁵ 4 T. R. 580.

⁶ *Ashton v. Molyneux*, 1 Barnes, 95.

⁷ *Osbaldeston v. Cross*, 2 Com. 612.

⁸ *Anon.* 2 Ves. 452.

⁹ *Loveridge v. Botham*, 1 B. & P. 49.

Where, after verdict and an injunction to stay execution, the parties finally settled the cause without the concurrence of the attorney, it was held that he might nevertheless proceed to tax his costs, with a view of commencing an action in his own name for the amount.¹

In taxing costs between solicitor and client, it is now settled, that the solicitor can maintain no charge for drawing his bill of fees and disbursements, for he is obliged by the statute to deliver a bill to his client without any fee—nor is he allowed the charge for the attendance of a clerk in court upon the taxation, the latter being considered to attend on the private retainer of the solicitor.²

With respect to the *costs of taxation*, the 2 Geo. 2, c. 23, s. 23, in express terms subjected the attorney to the payment of them, if a *sixth* part of the amount of the bill was deducted by the officer on taxation; but in case *less* than one-sixth part was taken off, the statute gave the court a discretionary power³ of directing those costs to be paid either by the attorney or client, according to the reasonableness or unreasonableness of the bill. In the exercise of this discretion, however, the courts were generally governed by the distinction pointed out by the statute, and made the client pay the costs of taxation, whenever *less* than a sixth part was taken off the bill.⁴ And the same even where the client advanced money to the attorney to pay certain disbursements included in the bill, and the sum deducted was more than a sixth part of the amount of the bill, exclusive of those disbursements, but less than a sixth part of the gross amount.⁵ The discretion is now, however, by the 6 & 7 Vict. c. 73, s. 37, given to the court, whether more than one-sixth is deducted or not, upon special circumstances being certified.

Where the order for taxing was not obtained till after the action on the bill had been commenced, the courts of King's Bench and Common Pleas, though more than a sixth was taken off, refused to allow the costs of taxation.⁶

The course in bankruptcy, also, as to the taxation of a solicitor's bill, proceeded by analogy to the statute 2 Geo. 2, c. 23. Where, therefore, upon retaxation by the master, the

¹ 1 Turner v. Bourne, 1 Pri. 72.

² 2 Anstr. s. Prac. 400.

³ Yea v. 491.

Webb v. Ston Frere, 14 Ves. 154.

Webb v. Stone, 1 Anstr. 260. Hurst

v. Dixon, 1 Barnes, 89. Cogan v.

Cave, 1 Dick. 96. Barker v. Bishop of London, 2 Barnes, 147.

⁵ Hindle v. Shackleton, 1 Taunt.

536.

⁶ Benton v. Bullard, 4 Bing. 561.

Harbin v. Miles, 9 B. & C. 755.

bill was reduced above a *sixth*, the solicitor was ordered to pay the costs of taxation.¹

If an attorney, in satisfaction of a bill delivered, accept a less sum than what appears to be there charged, and the bill is afterwards taxed, the attorney is not liable to pay the costs of taxation, notwithstanding a sixth part is deducted from the bill delivered—unless the sum at which the bill is taxed is less than the sum received by the attorney in satisfaction of the bill, by one-sixth of such last-mentioned sum.² Nor is the attorney liable to the costs, where the sixth part taken off the bill arose, not by the taxation of the particular *items*, but by the *whole of certain expenses* being disallowed—on the ground that the client was *not the person liable* to those charges—and not because they were objectionable in their nature or amount.³ But in a case before the vice-chancellor it was determined, that where *items* were charged in a solicitor's bill to his client, in respect of the defence of a third person at the alleged retainer of the client—and, in consequence of the solicitor failing to prove such retainer, those *items* were struck out on taxation, and such *items* were to be computed among the deductions, for the purpose of determining upon whom the costs of taxation were to fall; and that, generally, whenever *items* would be properly *taxable* if the facts alleged by the attorney were true, and are deducted because he does not establish those facts, the amount is to be reckoned as a deduction in the question of costs of taxation.⁴

Before the 6 & 7 Vict. c. 73, the executor or administrator of an attorney was not liable to the costs of taxation, although a sixth part of the bill for business done by the testator or intestate were deducted; for the statute imposed such costs upon the *attorney or solicitor only*; and an executor was held not to blame if he made out the bill from the attorney's books.⁵ Now, however, the last-mentioned act has (s. 37) extended the same rule to the personal representative and the assignee of the solicitor.

Where, on the taxation of a solicitor's bill, so large a sum was disallowed as to make it a matter of reprobation by the court, the court of Exchequer not only ordered the costs of taxation to be paid by the solicitor, but also ordered him to

¹ *Ex parte Westall*, 3 V. & B. 141. *Ex parte Inman*, Buck, 129.

Ex parte Hathaway, 2 Mad. 329.

² *Ecollier v. Dulong*, 2 Barnes, 98.

³ *White v. Milner*, 2 H. B. 357.

⁴ *Rigby v. Edwards*, 5 Mad. 20.

⁵ *Weston v. Poole*, 2 Str. 1056.

Dutton v. Agate, Say. Costs, 327.

pay interest upon a surplus balance remaining in his hands, though it was not shown that he had made any interest of it. The jurisdiction of the court to make such an order was declared to be independent of the 2 Geo. 2, c. 23, and to be founded on the necessary and inherent control of every court over the conduct of its own officers.¹

Where the attorney is entitled to the costs of taxation, he should demand them at the time; for if he settles a subsequent account with his client without applying for them, the court will refuse a rule to have them afterwards allowed.²

SECTION IV.

Of Actions and other Proceedings by and against the Solicitor.

By the 6 & 7 Vict. c. 73, s. 37, it is enacted, that no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, &c. at law or in equity, until the expiration of one month after such attorney, &c. shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, &c. subscribed with the proper hand of such attorney, or in the case of a partnership, by any of the partners, either in his own name or with the name and style of the partnership, or of the executor, administrator, or assignee of the attorney or solicitor, or be inclosed in, or accompanied by, a letter subscribed in like manner, referring to such bill.

Before any attorney can support an action for his fees, he must not only ³ *sign and deliver*, but he must also *leave* his bill with the party to be charged; ⁴ for the mere delivery of it to him (if the attorney take it back again) will not be sufficient, although the party should even acknowledge the debt and promise to pay it—the intention of the statute being, that the client should have due time to examine the charges made by the attorney, and take advice upon them if necessary.⁵

¹ *Rex v. Bach*, 9 Pri. 349.

⁴ *Clarke v. Donovan*, 5 T. R. 694.

² *Whitfield v. James*, 1 Bing. 207.

⁵ *Brookes v. Mason*, 1 H. B.

³ *Eiche v. Nokes*, 4 M. & S. 585. 290.

1 Mood. 359.

But where there are several assignees, it seems that the solicitor is not bound to serve *each* of them with a copy of his bill previous to the action; but that service upon any one will be sufficient,¹ if he has acted under the fiat.

A solicitor may maintain an action against an assignee for business done under a fiat, although the bill has not been taxed under the provisions of the bankrupt acts; for those provisions do not affect the right of an attorney against his employer, but only apply to the protection of the estate.² So, he may maintain an action for his bill up to the choice of assignees, without a previous taxation in a court of bankruptcy.³ And an attorney need not be admitted a *solicitor in chancery*, in order to maintain such action.⁴ The assignees, however, are not liable to be joined as defendants in an action by the solicitor for the costs of *issuing* the fiat, even though the petitioning creditor is one of the assignees.⁵

It was held no defence to an action by a solicitor against an assignee, that the commission was sued out under a representation by the plaintiff, that the commission would be operative in the Isle of Man, and that it had been wholly fruitless; for the commission itself, whilst in existence, could not be considered as a mere nullity.⁶

Where the solicitor to the commission received from the bankrupt a promissory note for his bill of costs in procuring his certificate—and the bankrupt had purchased the debts of many of the creditors—and the solicitor was indebted to the estate in such a sum, that the share of it coming to the bankrupt (standing in the place of those creditors in respect of the debts so purchased by him) would exceed the amount of the promissory note;—the solicitor was, under these circumstances, restrained by injunction, on petition, from negotiating the note.⁷ So, also, where a solicitor's bill was by an order in bankruptcy referred to a master for taxation, and after the bill was taxed, and more than a sixth taken off, the solicitor brought an action for the taxed costs, without deducting the costs of taxation,—the action was stayed on petition, and a reference was made to the master

¹ *Crowder v. Shee*, 1 Camp. 437.
Finchett v. How, 2 Camp. 279.
Oxenham v. Lemon, 2 Dow. & R. 461.

² *Tarn v. Heys*, 1 Star. 278.
Arrowsmith v. Barford, 1 Star. 279, note (b). *Finchett v. How*, 2 Camp. 279. *Crowder v. Davis*, 3 Y. & J. 433.

³ *Taylor v. M'Gougan*, 4 C. & P. 86. *Fisher v. Filmer*, 5 C. & P. 92.

⁴ *Wilkinson v. Diggell*, 1 B. & C. 158; and see *Ford v. Webb*, 3 B. & B. 241. Ex parte *Smith*, 19 Ves. 473.

⁵ 2 Camp. 276.

⁶ *Pasmore v. Birnie*, 2 Star. 59.

⁷ Ex parte *Harding*, Beck, 24, 37.

to tax the costs of the taxation of costs, which were ordered to be deducted from the amount of the taxed costs, and the balance only to be paid to the solicitor.¹

Though an attorney has not delivered his bill pursuant to the statute, and cannot therefore bring an action upon it, yet he may support a *fiat* upon the amount that is owing to him; though, in such a case, the bill will be afterwards referred to be taxed, either upon the application of the bankrupt, or of any of the creditors.² And where a solicitor, even pending an order for the taxation of his bill, and for *staying all proceedings at law* in the meantime, sued out a commission upon it,—he was held not to be guilty of a contempt, nor was the commission supersedable; for the order was construed to extend only to *bringing actions*, and the common and ordinary proceedings.³

A solicitor, who sues out a *fiat* for his client, is not in general answerable to the bankrupt in an action for damages for suing it out without sufficient cause, notwithstanding he sends in the messenger to take possession of the property of the bankrupt. In a case of this nature before Macdonald, C. B., he said there was no satisfactory ground for a verdict against the solicitor, who was professionally bound to act as he had done.⁴

A petition will lie against a solicitor to account for property received under the *fiat*.⁵

When a solicitor presents a petition in his own behalf in any matter of bankruptcy, the attestation required in other cases is in this instance dispensed with.⁶

The court of Common Pleas refused to stay proceedings, or to discharge a defendant on common bail (in an action brought by an attorney for the recovery of a bill of costs), though the ground of the application was, that such action was begun before the expiration of a month after the delivering of the bill;—because, as that circumstance might have been taken advantage of, either in pleading or at the trial of the cause, the court held it unnecessary to interfere upon motion.⁷

Where the previous delivery of an attorney's bill is necessary to be proved at the trial to support the action, it

¹ Ex parte Bellott, 4 Mad. 379.

² Ex parte Sutton, 11 Ves. 163.

Ex parte Steele, 16 Ves. 166. Ex

parte Howell, 1 Rose, 312. Ex

parte Prideaux, 1 G. & J. 28.

³ Moseley's Rep. 27. 1 C.B.L. 17.

⁴ Smith v. Gainford, 1 Rose, 148 (n).

⁵ Saxton v. Davis, 18 Ves. 72. 1 Rose, 79.

⁶ Ex parte Kingdon, 1 Mad. 446.

⁷ Harper v. Leech, 1 Barnes, 96. Tomlinson v. Clarke, 4 Moore, 4.

is sufficient to give in evidence a *copy* of the bill which has been delivered to the defendant, without proof of notice to produce the original.¹ But the plaintiff cannot give *parol* evidence of the contents of the bill delivered, unless he has given notice to produce it.² A mistake in the date of *items* in the bill, which does not mislead, has been held not to vitiate the delivery of it, if regular in other respects.³ And though the production of the writ is the usual mode of proving that the action was not commenced till the expiration of a month from the time of such delivery, yet the *nisi prius* record has been also holden to be good *prima facie* evidence that the action was properly commenced, and sufficient to satisfy (if uncontradicted) the statute. The defendant, however, may (if he can) contradict such evidence, by showing by a copy of the writ, that the action was really commenced before the time.⁴

After proving the delivery of his bill, the plaintiff must, also, give some general evidence that the *business was done*, as well as of his own *retainer* by the defendant.⁵ The performance of the business may be established by the evidence of persons, who were in the plaintiff's office at the time it was done; and the plaintiff's engagement by or on the behalf of the defendant may be made out, either by direct evidence of the fact,—or, as it should seem, by showing that the defendant, from time to time, or occasionally, gave directions concerning, or appeared as a party in, the proceeding. And it is a general rule,⁶ that the reasonableness of the *items* in the bill cannot be discussed or entered upon at the trial, nor upon the execution of a writ of inquiry after a judgment by default; for, as the client has a summary method of trying the propriety of the charges by a reference to the master, the waiver of that course is held to amount to an admission of the fairness or reasonableness of the charges, if the business were in fact done.⁷ So, the negligence of the attorney cannot be set up as a defence upon the trial, however his conduct might furnish the ground of an action for negligence,—at least, not unless it were such a species and degree of negligence, as to deprive the defendant of all possible advantage from the proceedings constituting

¹ *Anderson v. May*, 2 B. & P. 237.

⁵ But see 2 Barnard, 233.

² *Philippson v. Chase*, 2 Camp.

⁶ See ante, 934.

110.

³ *Williams v. Barber*, 4 Taunt.

⁷ *Williams v. Frith*, Doug. 198.

806.

⁴ *Webb v. Pritchett*, 1 B. & P.

Anderson v. May, 2 B. & P. 237;

and see 1 Esp. 159. Hullock,

500.

263.

the charges in the bill.¹ Before the passing of the 6 & 7 Vict. c. 73, it was held that if the bill was not liable to taxation under the 2 Geo. 2,—as, if it was entirely for *conveyancing*, the *items* in it were open to discussion and examination at *nisi prius*; and, consequently, that the plaintiff in such a case (besides proving the performance of the business and the retainer) ought to show at the trial that the charges were reasonable.²

Where some evidence is necessary of the plaintiff *being an attorney*,—as in an action for words, for instance, spoken of the plaintiff in his profession,—he need not prove this by producing his admission, or by a copy of the roll of attorneys; but proof that he *acted as* an attorney has been held to be sufficient.³

But although an attorney cannot *support* an *action* upon his bill before the expiration of a month after the delivery of it, yet the omission to deliver it a month beforehand will not prevent his right of *setting-off* the amount in an action brought *against* him. He must not, however, produce it at the trial by surprise; though it is sufficient, in such a case, to deliver it time enough for the plaintiff to have it taxed before the trial. But it cannot be set off, if it has not been delivered at all.⁴

It was decided by Lord Kenyon at *nisi prius*, that an attorney cannot maintain an action even for the amount of money *actually expended* by him in respect of the common law business of his client, without a previous delivery of his bill, notwithstanding he may have agreed to take the amount only of the money expended in satisfaction of his bill.⁵ But it was afterwards determined, where an attorney at the defendant's request put in bail for him in an action, and afterwards paid the debt and costs, and then sued the defendant for the amount so paid, without making any charge whatever for his own trouble,—that, in such a case, the attorney need not deliver a bill to entitle him to a verdict,—Lord C. J. Gibbs saying that the statute only applied to cases, where an attorney sues to recover a compensation for his labour and skill.⁶ If, however, the bill be *actually delivered*, containing some charges liable to taxation, and others not,—and it appear that the delivery was not strictly

¹ *Templar v. M'Lachlan*, 2 N. R. 136.

² *Hullock*, 501.

³ *Berryman v. Wise*, 4 T. R. 366.

⁴ *Martin v. Winder*, Doug. 199 (n). 1 Esp. 449. *Murphy v. Cunningham*, 1 Anstr. 198.

⁵ *Miller v. Towers, Peake*, 102.

⁶ *Prothero v. Thomas*, 6 Taunt. 196.

conformable to the statute, the plaintiff must in that case be nonsuited; for if *one single taxable item* be found in a bill delivered, it brings the whole bill within the operation of the statute;¹ and this more especially when the other *items* in it are for business done in the character and in the exercise of the duties of an attorney,—such as for conveyancing business, for example, in which case the plaintiff cannot split his demand, but the statute attaches upon the whole.² And, from what Lord Eldon says in his judgment in this case, it would seem, that if *items* even *not connected* with the profession of an attorney are inserted in the bill, the plaintiff will be equally precluded from recovering upon them,—on the ground, that an attorney who inserts his whole demand upon his client in a bill containing taxable *items*, will be taken to agree that he will not bring an action upon *any part* of such demand until the bill has been delivered a month. In one case, also, though *no bill* was delivered before the action brought, but the *whole demand* was *connected* with the plaintiff's character of an attorney, it was holden that the attorney's demand could not be severed;³ though in another case, where *no bill* had been delivered, Lord Kenyon, under the old law, admitted proof of charges for conveyancing business;⁴ and in one instance, where *no bill* had been previously delivered,—notwithstanding the plaintiff delivered a bill of the particulars of his demand under a judge's order subsequent to the commencement of the suit, in which were contained *items* liable to taxation,—the plaintiff was held entitled to recover the amount of other *items* charged in respect of *payments* for the client's use, such payments *not being referable to the plaintiff's business of an attorney*.⁵

SECTION V.

Of his Liability for Misconduct, and herein of his general Liability.

The court of review has power to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat.⁶

Therefore where the assignees, on the representation of the solicitor, that he was authorized to receive a dividend for a

¹ *Winter v. Payne*, 6 T. R. 645.

² *Hill v. Humphreys*, 2 B. & P. 343; see 1 Camp. 437.

³ *Benton v. Garcia*, 3 Esp. 149.

⁴ *Miller v. Towers*, supra; and see 2 B. & P. 345, per Lord Eldon.

⁵ *Mowbray v. Fleming*, 11 East. 285.

⁶ *Ex parte Benham*, 2 M. & A. 280.

creditor, paid him the amount, and it turned out that he had no authority to receive it; it was held that an order might be made upon him for repayment of the dividend to the creditor.¹

An attorney or solicitor is liable to be punished for any misconduct in a summary way by the court, of which he is an attorney or solicitor;—on the principle, that every court is entitled to exercise a necessary control over the conduct of its own officers.² If a solicitor, therefore, lends his name to a person forbid by the lord chancellor to sue out a fiat, he will be struck off the roll for that reason alone. And Lord Eldon, upon one occasion, said he would in such a case go further; and that whenever a case of that nature should be brought forward, he would direct the attorney-general to prosecute for a conspiracy.³ So, in a case where two solicitors were guilty of gross misconduct in suing out a fraudulent commission, Lord Thurlow ordered the solicitors to be committed, and deprived one of them of his office of a master extraordinary in Chancery;—and further ordered, that they and other parties concerned should pay the costs, as between attorney and client.⁴ And where the solicitor under a commission took upon himself likewise the several inconsistent characters of banker, commissioner, and assignee, Lord Eldon ordered that he should never be permitted to take out another commission.⁵

An application to remove a solicitor from being or acting as a master extraordinary of the court of Chancery, and to strike him off the roll of such court, (though it may be properly made by reason of his conduct in a matter of bankruptcy,) should not be made *in the bankruptcy*, but should be addressed to the general jurisdiction of the court.⁶

The court of review will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the court, and not in an ordinary case between attorney and client.⁷

Where an attorney has received money for the use of his client, and not accounted for it, and has afterwards become

¹ Ex parte *Story*, 4 D. & C. 504.

² Ex parte *Pranker*, 3 B. & A. 257. Ex parte *Fisher*, 1 Chitt. 694. *Rex v. Bach*, 9 Pri. 349.

³ 6 Ves. 2; and see *In re Jackson and Wood*, 1 B. & C. 270. But an agreement by an attorney to pay a share of the profits of his business

to another person who is not an attorney, is not illegal. *Candler v. Candler*, 1 Jacob, 270.

⁴ Ex parte *Thorp*, 1 Ves. Jun. 394; and see Ex parte *Conway*, 13 Ves. 62.

⁵ Ex parte *Edwards*, 6 Ves. 4.

⁶ Ex parte *Lowe*, 1 G. & J. 78.

⁷ Ex parte *Ball*, 3 D. & C. 116.

bankrupt, and obtained his certificate, the court of Queen's Bench will not, on motion, unless he has been guilty of fraud, order him to repay the money so received; the amount being a debt barred by the certificate. But if the attorney committed fraud in receiving and not accounting, the court will then, in the exercise of its general jurisdiction over its officers, enforce such payment, as a modification of the punishment, which it might otherwise inflict for his misconduct.¹

Where a solicitor attested a petition in bankruptcy whilst in prison, and it was contended that the petition was void under the statute of the 12 Geo. 2, c. 13, s. 9, (which makes void any process sued out in any court of law or equity by an attorney or solicitor in prison, and renders him also liable to be struck off the rolls, and incapacitated from acting as an attorney in future;)—it was held, that so highly penal an enactment must be construed strictly; and that in this case the statute did not apply; for that a petition in bankruptcy was not, strictly speaking, a proceeding either in *law or equity*.²

In many cases the solicitor, when guilty of misconduct, will be ordered to *pay the costs* of the proceeding in which he has misconducted himself, or of the application made to the court complaining of his conduct;—as where he obtained the docket (contrary to the general order) by a *false description* of the commissioners in a country commission.³ So where a solicitor struck a second docket against a bankrupt, merely on the ground of a variation in the spelling of the bankrupt's name, though knowing it to be the same person,—Lord Eldon ordered the second commission to be superseded at the costs of the solicitor.⁴ And where he was, under the old bankrupt law, implicated in suing out a *concerted*⁵ commission, he was held jointly liable with the petitioning creditor and the bankrupt for the costs of superseding it.⁶ In like manner, where a solicitor was employed by a bankrupt to procure his certificate, and he neglected to obtain the signatures of the commissioners, though it had long before been signed by the proper number of creditors,—he was ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application.⁷ So, where the solicitor of a bankrupt presented an unnecessary petition,

¹ Re *Bonner*, 4 B. & Adol. 811.

⁵ But see 1 & 2 Will. 4, c. 56,

² Ex parte *Thompson*, 1 G. & J. 308.

s. 42.

³ Ex parte *Conway*, 13 Ves. 62.
Ex parte *Arrowsmith*, 14 Ves. 209.

⁶ Ex parte *Green*, 1 G. & J. 88.
Ex parte *Prosser*, Buck, 77.

⁴ Ex parte *Ward*, 1 Rose, 314.

⁷ Ex parte *Houghton*, 1 G. & J. 14.

he was ordered to pay 40*s.* costs to the respondent;¹ and whenever a petition is wholly unfounded, he will in that case be liable to pay the whole costs of the application.² Where, also, in an affidavit of service of a petition, the whole petition was recited *verbatim*, with a view to enhance the expense, Lord Hardwicke ordered the solicitor who drew it to pay the costs out of his own pocket.³ So when he makes an affidavit in support of a petition, which contains irrelevant and scandalous matter, the court will order it to be taken off the file, and will direct the solicitor to pay all costs as between solicitor and client.⁴ If a solicitor, also, refuses to deliver up the proceedings to the assignees, and drives them to an application to the court to obtain them, costs will always in such a case be given against him.⁵

In general, however, a solicitor is not chargeable with costs unless he be guilty of such an abuse as amounts to a contempt;⁶ and though, upon superseding a fraudulent commission of bankrupt, the solicitor was charged with costs as well as the other parties, yet he was held not chargeable with the costs of a criminal prosecution which was not under a direction in bankruptcy, and in which he was not a defendant.⁷

When an attorney has been made bankrupt and obtained his certificate, the court will not compel him to pay a sum of money which before his bankruptcy he received in the character of attorney, and which it was his duty to transmit to the person entitled.⁸

Where a penal action was brought against a defendant, on the 2 Geo. 2, c. 23, for acting as a solicitor *in the court of Chancery*, viz. in the matter of T. S., a bankrupt, the defendant not being a solicitor of the said court—and the proof adduced was, that the defendant had been consulted, and was instrumental in the matter of a petition *in bankruptcy* to the lord chancellor by the creditors of T. S.;—the plaintiff was nonsuited, on the ground that proceedings *in bankruptcy* are not proceedings *in Chancery*.⁹

An attorney may also make himself personally liable from his own undertaking—or from dealing with a party in the nature of a principal, so as to induce such party to give him credit instead of his employer, though the business (at the

¹ Buck, 313.

² Ex parte *Cuthbert*, 1 Mad. 78, 80.

³ Ex parte *Smith*, 1 Atk. 139.

⁴ Ex parte *Simpson*, 15 Ves. 476.

⁵ Ex parte *Hardy*, 1 Rose, 395.

Ex parte *Titley*, 2 Rose, 83.

⁶ Ex parte *Heywood*, 13 Ves. 67.

⁷ Ex parte *Arrowsmith*, 14 Ves. 209.

⁸ Ex parte *Culliford*, 8 B. & C. 220.

⁹ *Ford v. Webb*, 3 B. & B. 241.

time of its being transacted) is known to be for the benefit of his employer; and the question in such a case, to whom the credit is given, is a proper question for the jury to determine.¹ So, where the solicitors of the assignees of a bankrupt, whose lands were distrained for rent, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained,"—it was held, that the solicitors rendered themselves personally liable for the rent.² Where also the attornies for the plaintiff and defendant (in a cause which was ready for trial) entered into an agreement, whereby they *personally* undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a particular manner,—it was held, in this case, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified,³ and was liable to an action for them.

¹ *Scrace v. Whittington*, 2 B. & C. 11; and see *Foster v. Blakelock*, 5 B. & C. 328.

² *Burrell v. Jones*, 3 B. & A. 47.

³ *Ireson v. Cenington*, 1 B. & C. 160.

CHAPTER XXIV.

OF THE BANKRUPTCY OF PUBLIC COMPANIES.

The preceding part of this work has related to the bankruptcy of individuals, or of firms, each individual of which has become bankrupt, the only cases to which the bankrupt laws formerly applied. The legislature, however, has now provided for the bankruptcy of public companies of certain specified kinds, without any of the members or shareholders becoming individually bankrupt, or committing any act of bankruptcy. This has been effected by the 7 & 8 Vict. c. 111, intituled *An Act for facilitating the winding up of Joint Stock Companies*, a short analysis of which follows. For the details the reader is referred to the Act itself, which is given at large, *post*, vol. 2, p. 431.

The companies coming under the operation of this Act are defined by the 1st section to be—

1. Commercial or trading companies incorporated by Charter or Act of Parliament.
2. Commercial or trading companies subsisting under 1 Vict. c. 73, or subject to the provisions of that Act.
3. Commercial or trading companies registered provisionally or completely under 7 & 8 Vict. c. 110, or any other company coming within the definition of a joint stock company, as given in that Act.

The petitioning creditor's debt is to be of the same amount, and is subject to the same rules as in ordinary bankruptcies. The following are specified as the acts of bankruptcy on which a fiat may issue against a company :—

1. A declaration of insolvency in a form set out in the schedule of the Act, filed in pursuance of a resolution of a board of directors duly summoned for the purpose.

2. Failure to pay, secure, or compound for a debt, for which judgment has been recovered against the company, or any person authorized to be sued on its behalf, after fourteen days' notice, where the creditor is in a condition to sue out execution. The notice is to be in writing, and must be served on the company by being served on the chief clerk, or secretary, or registrar, or, if there be none, on any director, or by being left at the head office of the company, and must require immediate payment.

If the execution be in the meantime suspended or restrained, no further proceeding is to be taken on the notice until the plaintiff is again in a condition to sue out execution, when he may again proceed by notice.

3. Disobeying a decree or order of a court of Equity, or in any matter of bankruptcy or lunacy, directing payment of any sum of money by the company; the order or decree having been served upon the company in the manner before provided as to notices. The creditor has first to obtain and serve the order for payment, and upon non-compliance therewith he has to obtain from the court making the order another order fixing a peremptory day for payment; it is the disobedience to the second order fourteen days after service, that constitutes the act of bankruptcy.

4. The only other act of bankruptcy is the failure to pay, secure, or compound for a debt of sufficient amount to support a fiat under the ordinary bankrupt law; where an affidavit of the debt is filed in one of the superior courts by the creditor,—(who must depose also that he believes that the company is a commercial or trading body, incorporated or associated as specified in the Act,) and where a writ of summons is sued by the creditor out of the same court, against the company or any person authorized to be sued on its behalf, a copy of which is served upon the company; unless the company shall satisfy one of the judges of the court that the company intends to defend the action upon its merits, and shall within a month after service of the summons cause an appearance to be entered. Otherwise, on failure to pay, secure, or compound for the debt within a calendar month after the service of the summons, the company is deemed to have committed an act of bankruptcy from the time of the service of the summons.

The practice in suing out and opening the fiat is to be the same as in ordinary bankruptcies, the Act providing¹ that the law and practice in bankruptcy now in force shall extend so far as the same may be applicable to the Act and to fiats issued under its provisions, except when otherwise directed.

After the bankruptcy has been found, a duplicate of the adjudication must be served² on the person who was at the date of the fiat a chief clerk, or secretary, or registrar of the company, or, if there be no such person, on any person who was then a director, or must be left at the head office for

¹ See s. 11.

² See s. 3.

the time being of the company; and the company have, as in ordinary bankruptcies, five days to show cause against the validity of the adjudication.

They may too, as in ordinary bankruptcies, consent to the bankruptcy being advertised before the five days have expired; and the consent may be given, and the previous surrender may be made on behalf of the company by the chief clerk, or secretary, or registrar duly authorized to make such surrender.¹ The assignees are to be chosen as in ordinary bankruptcies, and they are authorized by the Act² to maintain proceedings against any person or persons, whether a member or members of the company or not, to recover any debt or demand on behalf of the company; and if the proceedings be against a member of the company he cannot set off any demand which he has against the company as a member of it.

The balance sheet is to be prepared and verified by such of the directors,—or, if there be none, by such of the members of the company as the court acting in the prosecution of the fiat may direct; and those who are directed by the court to prepare the balance sheet stand in the place of the bankrupt in ordinary bankruptcies in many respects, such as the surrender, examination, allowance, and freedom from arrest.³

The court acting in the prosecution of the fiat is expressly authorized by the Act to summon before it any person capable of giving information respecting the affairs of the company, with the same powers to enforce its orders as in ordinary bankruptcies; and if the person summoned is a member of the company, he is only to pay such costs (if any) as the court directs. The court may also order any officer or agent of the company, after the adjudication, to deliver over all the monies and securities of the company in his possession.

The Act also contains a clause which is not confined to the specific object of the Act, but is an enactment applying to the general bankrupt law, and this clause⁴ empowers all courts of bankruptcy to commit any person disobeying any of their rules or orders to the Queen's Prison, or the common gaol of any county, city, or place where the person may be found or shall usually reside, there to remain till he shall have conformed to the rule or order, or the court or Lord Chancellor otherwise order.

¹ Sect. 3, *post*, vol. 2, 432.

² Sect. 8, *post*, vol. 2, 454.

³ See ss. 12, 13, 14, *post*, vol. 2, pp. 435, 436.

⁴ Sect. 19; see vol. 2, p. 440.

These provisions are all that relate directly to the administration of the assets of the company in bankruptcy, as between the company and its creditors. The remainder of the Act relates to the adjustment of the affairs of the company as between itself and its members. The Act expressly provides¹ that the assignees may take proceedings against the members as if they were strangers, and *vice versâ*; that there shall be no set-off of claims, which any person has or is subject to, as a member, against any which he has or is subject to, as a debtor or creditor of the company; that no proceeding by a creditor, so far as regards his recourse against any member personally, shall affect his right to issue a fiat or prove against the company, and *vice versâ*; and that the bankruptcy of the company is not to be construed as the bankruptcy of any member.

With regard, however, to the affairs of the company, as between itself and its members, the court acting in the prosecution of the fiat has two authorities or duties:—

First, to direct the assignees, in proper cases, to present a petition to the court of Chancery for such directions as may be necessary for winding up the affairs of the company; for which purpose certain powers are given to the court of Chancery by the Act.²

Secondly, to certify to the Board of Trade the causes of the failure of the company, in order that the Queen may determine the company, and that prosecution may be instituted if considered proper.³

¹ Sects. 8, 9, 10,

² Sects. 20, 21, 22, 23, 24; only one case has yet come before the court under these clauses, *In re Forth Insurance Company*, Rolls, June 29th, 1846. The form of the

petition and the order in this case, for which the editor is indebted to his friend Mr. Rolt, are given *post*, vol. 2, *Appendix*.

³ Sects. 25, 26, 27, 28, 29.

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